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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 160.

WILLIAM W. CLEARY, ASSIGNEE IN BANKRUPTCY OF MATTHIAS ELLIS, PLAINTIFF IN ERROR,

vs.

THE ELLIS FOUNDRY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 12, 1886.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William W. Cleary, of Covington, in the State of Kentucky, assignee in bankruptcy of the estate of Matthias Ellis, of Carver, Massachusetts, plaintiff, and The Ellis Foundry Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual places of business at Carver and at Boston, Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twelfth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of September, A. D. 1886.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Le Baron B. Colt, circuit judge.

WILLIAM W. CLEARY, of Covington, in the State of Kentucky, as he is Assignee in Bankruptcy of the Estate of Matthias Ellis, of Carver, Massachusetts, Plaintiff,

v.

THE ELLIS FOUNDRY COMPANY, a Corporation Duly Organized under the Laws of the Commonwealth of Massachusetts, Having its Usual Places of Business at Carver and at Boston, in the District of Massachusetts, Defendant.

In an action of contract.

4 *Plaintiff's Declaration.* (*Filed Oct.* 16, 1882.)

First count. And the plaintiff says the defendant owes him nine thousand three hundred and ninety $\frac{43}{100}$ dollars and interest on said sum from Jan. 1st, 1880, to the date of the writ, for money had and received by the defendant to the plaintiff's use, according to the account hereto annexed, marked "A."

A.

Ellis Foundry Company to W. W. Cleary, assignee, Dr.

To proceeds of policy No. 68429, of Conn. Mut. Life Insurance Company, on life of Matt. Ellis, collected by defendant on or about Jan. 1st, 1880 ---------- 9,390 43

Interest on the same to Oct. 1st, 1882.

Second count. And the plaintiff says that said Ellis, on or about June —, 1878, filed his petition in bankruptcy in the district court of the United States for the district of Kentucky and was duly adjudicated a bankrupt by said district court, and one H. N. Bates, of Greenup, Kentucky, was duly appointed assignee of the estate of said Ellis in bankruptcy, who continued as such assignee until on or

about May 20th, 1882, when said assignee resigned his trust, and the plaintiff was thereafter duly appointed assignee of said estate in place of said Bates; that said Ellis was at the time of said petition in bankruptcy the owner of two certain policies of insurance upon his life, issued by the Connecticut Mutual Life Insurance Company, a corporation doing business at Hartford, in the State of Connecticut,
4a one of said policies, numbered 68429 upon the books of said company, being for $10000; the other numbered 68,430 and being for $5,000; that said Ellis omitted from his schedule in bankruptcy the said policies and concealed and withheld the same from his assignee; that said policy numbered 68430 was by said Ellis, without the knowledge or consent of his assignee, surrendered to said insurance company March 2d, 1879, and a portion of the surrendered value was by said company credited to said Ellis and applied in payment of the annual premium then due upon policy numbered 68429; that thereafter, on or about May 21st, 1879, said Ellis, still wrongfully holding and detaining said policy numbered 68429 in said company from his assignee in bankruptcy, and without the knowledge, consent, or approval of said assignee in bankruptcy, transferred and assigned said policy to the defendant, who thereafter continued to hold the same until the death of said Ellis, in November, 1879; that the said defendant, on or about Jan. 1st, 1880, collected and received from said insurance company the sum of $9,390.43 as proceeds of said policy numbered 68429, the property of the assignee in bankruptcy of said Ellis; and the plaintiff says the defendant, through its officers and servants, well knew the bankruptcy of said Ellis, and that said policy was the property of his assignee in bankruptcy and not the property of said Ellis when the same was assigned by said Ellis to the defendant; and the plaintiff says the existence of said policy and the right and title of the assignee in bankruptcy in the same was concealed and withheld from the assignee in bankruptcy by said Ellis during his lifetime and by the defendant after his death, and that knowledge of the
5 same first came to the assignee in bankruptcy a short time prior to the commencement of this action, and that immediately upon his becoming aware of the facts in relation to the same he demanded the proceeds of said policy from the defendant, who has refused and neglected to pay the same; wherefore he says the defendant owes him nine thousand three hundred and ninety $\frac{43}{100}$ dollars and interest thereon from January 1st, 1880, to the date of the writ.

Both of the above counts being for the same cause of action.

To the damage of the said plaintiff, as he says, the sum of twenty thousand dollars.

The writ in this cause is dated the thirtieth day of September, A. D. 1882, and was duly entered at the October term of this court, A. D. 1882, when and where the parties appeared by their respective attorneys.

On the twenty-first day of October, A. D. 1882, the following answer was filed:

Defendant's Answer. (*Filed Oct.* 21, 1882.)

And now comes the defendant in the above-entitled cause and for answer to the plaintiff's writ and declaration, says that this defendant denies that the plaintiff is or ever was assignee in bankruptcy of Matthias Ellis, mentioned in the plaintiff's writ; and this defendant denies that it ever had or received or collected the proceeds of policy No. 68429, mentioned in the plaintiff's declaration, or of any other policy mentioned or referred to in the plaintiff's declaration or in either count thereof, or any part of
6 said proceeds, and denies that the defendant ever had or received any money to the plaintiff's use, either the sum alleged by the plaintiff or any part thereof or any other sum; and this defendant denies each and every allegation, averment, statement, item, and particular in the first count of the plaintiff's declaration contained and each and every allegation, averment, statement, item, and particular contained in the account annexed to the plaintiff's declaration.

And this defendant, further answering, denies each and every allegation, averment, statement, item, and particular in the second count of the plaintiff's declaration contained; and this defendant, further answering, denies that it owes the plaintiff the sum alleged by the plaintiff in either count of the plaintiff's declaration or any part thereof or any other sum or any interest, as alleged by the plaintiff; and this defendant, further answering, says that if the defendant received anything as the proceeds of any of said policies it had full right to receive and retain the same, and it claims to hold the same against the plaintiff.

And this defendant, further answering, says that if the plaintiff or H. W. Bates, mentioned in the plaintiff's declaration, ever had any cause of action against this defendant, either upon the alleged causes of action set forth in the plaintiff's declaration or any of them, or otherwise, which this defendant denies, this suit was not brought within two years from the time when such alleged cause of action or such alleged causes of action accrued.

THE ELLIS FOUNDRY COMPANY,
By BALL, STOREY & TOWER, *Its Att'ys.*

7 *Verdict and Judgment.*

Issue being thus joined, this cause was thence continued from term to term to the May term of this court, A. D. 1885, when, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned to hold said circuit court, sitting, the cause, after a full hearing, was committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, returned their verdict therein and upon oath said: The jury find for the plaintiff and assess damages in the sum of sixteen hundred and fourteen dollars and forty cents.

This cause was thence continued to the present October term. And now, to wit, October 27, A. D. 1885, it is considered by the court that the said William W. Cleary, assignee, plaintiff, recover of the said Ellis Foundry Company, defendant, the sum of sixteen hundred and twenty dollars and eighty-five cents, damages, and his costs of suit, taxed at —.

On the twenty-seventh day of October, A. D. 1885, the following bill of exceptions is filed and allowed by the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, as of the third day of October, A. D. 1885, before the jury left the bar, and is in the words and figures following:

8 *Plaintiff's Exceptions.* (*Filed as of October* 3, 1885.)

This was an action of contract brought by the assignee in bankruptcy of Matthias Ellis, late of Carver, Massachusetts, to recover the sum of $9,390.43, the proceeds of a certain policy of insurance upon the life of the bankrupt, issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for the sum of $10,000, on March 2d, 1867.

The writ was dated Sept. 30th, 1882.

At the trial, before Carpenter, J., and a jury, the evidence, so far as material to the bill of exceptions, was as follows:

Mathias Ellis, of Carver, in the State of Massachusetts, filed his petition in bankruptcy in the district court of the United States for the district of Kentucky on the 3d day of July, 1878, and one Horace W. Bates, of Riverton, Kentucky, was duly elected his assignee on August 6th, 1878, and continued to act as such assignee until June 6th, 1882, when he resigned, and the plaintiff was duly appointed and qualified as assignee in his stead. The schedule of assets filed in said cause were [was] duly signed and sworn to by said Ellis and disclosed no assets of value, except certain articles claimed as exempt, and neither under the head of Schedule B (3), annexed to his petition, which schedule at the top thereof reads as follows, viz:

"*Choses in Action.*"

Instructions.—Enter the items in the following order: 1, debts due petitioner on open account; 2, stocks in incorporated companies and interest in joint stock companies; 3, policies of insurance; 4, unliquidated claims of every nature, with the estimated value"—nor in any other part of his schedule of assets

9 did he mention any policy of insurance.

That said bankrupt at one time, some years prior to the date of his petition in bankruptcy, had obtained a large amount of insurance on his life, but he had been unable to pay the annual premiums, and the policies had, many of them, lapsed; that on March 2d, 1867, he had obtained from the Connecticut Mutual Life Insurance Company three policies on his life—Nos. 68428, 68429, and 68430—68428 and 68429 being for the sum of ten thousand dollars each, and 68430 being for the sum of five thousand dollars. Copies of 68428 and

68429 were in the case and were alike in all respects. A copy of 68429 is hereto annexed, marked A. Policy 68430 was surrendered to the company March 1st, 1879, as appears by Exhibit C, hereto annexed. It appeared from the testimony of the officers of the Connecticut Mutual Life Insurance Company that they had in their possession an assignment of the three policies, a copy of which said assignment is hereto annexed and marked Ex. B. The plaintiff showed that said Ellis had been, for several years prior to the date of his petition in bankruptcy, owing a large amount of money ($150,000), including a number of executions, and produced witnesses who testified that a large part of the indebtedness was contracted between 1869 and 1874, and that Ellis had, between 1874 and 1877, repeatedly, in response to repeated demands, said he was unable to pay.

The plaintiff called as a witness E. Rollins Morse, who testified that he had been in business in Boston as a banker for twenty years; that he had been acquainted with the late Matthias Ellis
10 since 1863; that he knew that at one time Ellis had some interest in some iron mines or hills in the West; that he did not know whether it was in 1873, but should say it probably was; that was his chief business or interest that he knew; that he frequently visited the witness' office when in the East, and very frequently left papers with him for care and safe-keeping, which were put in an envelope marked with Ellis' name in the witness' private trunk; that it was never understood that the witness was to examine them necessarily, but he looked upon it that he had a right to do it if he wanted to, but that he very seldom did it; that he did not know that he ever did it. The witness remembers seeing one assignment of insurance policies to himself. It was a policy of the Mutual Benefit Life Insurance Company, he thought, which he subsequently collected, and which was the only one he ever remembered of having had or seen; that he did not recollect the number of it. The amount collected on that policy by witness was about $16,000. It was changed from time time—marked down—to keep it alive; that he did not think he ever had in his possession or saw a paper purporting to be the assignment of three policies of insurance in the Connecticut Mutual Life Insurance Company on the life of Matthias Ellis; that he did not remember of ever having seen or had it; that the first time he knew or had reason to believe that a paper purporting to be the assignment of the policies was in existence was when he was called upon by Mr. McFarlane (the treasurer of the defendant corporation), who said that the company declined to pay him the money on the policy assigned to him unless he
11 (witness) stated that he had no claim under that policy; that this was after Ellis' death a short time; that at the request of the defendant's treasurer he signed the letter Ex. D; that he did not remember having any knowledge that there was any assignment of these policies to him before the day on which he signed that letter and did not think he could have; that he could not remember the amount of the policy that Mr. McFarlane called his attention to; that he should have said there were three policies, but

that he could not remember positively about, that it was so long ago; did not put it specially in his mind to keep it, as he did not expect to have to think of it again; that he thought there were three policies, of $5,000 each, but might be mistaken; that he had never, to his knowledge, been shown any paper purporting to be an assignment of these policies from Matthias Ellis to himself; that he did not remember being shown anything of the kind; that it was so long ago that he may have forgotten it; that he thought he did have more than one policy on Ellis' life at one time; they varied greatly, because at one time Ellis was unable to pay the premiums and we were obliged to change them about, so that he thought he did have more than one policy in the beginning; that he thought the policy he collected under was originally two policies, and it had been changed perhaps two or three times, certainly twice; that he a number of times signed papers in connection with the surrender of a policy; that when he originally took the policies he used to pay in cash, and then certainly once, and the witness thought twice, when he took them he was going to reduce the first value in
12 order to pay the premiums on them; that he did not examine the papers so signed with any care at all; that the money collected by him after Ellis' death was from Mr. Niver, the Mutual Benefit Insurance Company of New Jersey; that those two policies he received from Ellis and held them in connection with a trust that started many years prior to Ellis' death; witness thought it was started by a friend of Ellis for the benefit of his children, and the two policies on which the money was collected by the witness were policies that Ellis had handed witness with the request that witness would add them to that trust; that they were so added by the witness and the money was collected on the policy from the Mutual Benefit Insurance Company of New Jersey; that he never entered into any agreement with Mr. Ellis for any other trust than what the witness had mentioned and never accepted any other; witness examined Ex. C and stated that he had no recollection of it at all; that if he signed the paper he did so at Mr. Ellis' request; if he signed it "E. Rollins Morse, trustee," he supposed that he was under the impression that the paper was in connection with the trust already spoken of, but that he signed a great many papers at that time without knowing —; that he failed to in any way connect Ex. D with the trust held by him (the Hovey trust); that he had been unable to find any memorandum of any policies in the Connecticut Mutual Life Insurance Company; that at the time the matter was first presented he looked over all his memoranda or documents to see if he could find anything which would entitle him to retain those policies at that time and found no memoranda of anything of any kind, in any shape or manner; that after Ellis' death he wrote the letter (Ex. D) to say that he made no claim against the
13 company.

On cross-examination he stated that he had no distinct recollection as to the number of papers Ellis handed him from time to time in his lifetime; that he didn't think he ever handed him any assignment of policies; that he thought Ellis did not hand him, but

merely showed him, the assignment of the policies in the New Jersey Company and said he was going to take it to the office; that he had no recollection as to how many policies of insurance he ever had in his possession from Matthias Ellis; that he could not tell certainly; that he was very certain that he had more than one policy of insurance in his possession from Ellis; whether more than two or three he could not say at all; he didn't remember; that he remembered what office the one he collected was in, but not the others; that he didn't know that he had any others; that he didn't recollect whether he did or not; that he didn't recollect anything about it; that he kept a memorandum of the papers that Ellis brought him for the trust before spoken of, but not of all that he brought to him for safe keeping until he came again; that he kept all the papers in the same box that he before referred to; that he had no doubt at all that he signed the paper Ex. D, if the Connecticut Mutual Life Insurance Company say they hold such a paper; that before it was called to his attention he had no recollection of signing such a paper; that he knew that he had signed several papers in connection with several companies; that he had an idea he signed that paper without reading it; that that was not his habit with his own business, but that he sometimes signed papers without reading them, when not connected with his own business; that
14 he knew that it would not affect his own business; from the printed part of the paper that he could see what it was; that he had no doubt that the signature was genuine; that he had not the slightest remembrance of how many papers Ellis brought him from time to time and which witness put in that box; that he took no memorandum of it; they were put in a private box of his own in his own safe; that the box had a lock to it; that Ellis had no key to it; that the witness had the key; that he did not mean to swear that the assignment of the three policies of the Connecticut company was never in the box; all he meant to say was that he didn't remember it; that it was very difficult to remember so many years back; that he did not recollect defendant's counsel coming to his (witness') office until he spoke of it in the cross-examination, but remembered it then; that he did not recollect whether it was two or five years ago; that it was after Ellis' death; that at that interview he substantially told counsel that he had forgotten and did not remember anything about the matter; didn't think he went so far as to say his memory was a blank, but that he said he didn't recollect distinctly about it; that he did not have, as he had already said, any recollection of any assignment, but he thought he had seen one of another company; that he did not mean to swear that the assignment was not in his possession; that he had not sworn that yet; that he had no recollection of signing the paper Ex. C now that he has seen it.

On redirect examination witness identified Ex. D as in his own handwriting, and stated that it was written at the request of Mr. McFarlane, and that he thought he delivered it to McFarlane,
15 he remaining while he wrote it; also that he had no recollection of sending to the Connecticut Mutual Life Insurance

Company any assignment of the policies. On recross witness stated he could not say that he remembered that he did not send the assignment to the Connecticut Mutual Company; that he presumed he had no recollection on the subject either one way or the other whether he did or did not. He certainly did not remember of sending any; that he did not swear that he did not have the assignment, and he did not swear that he did not send it to the company. It further appeared from the testimony of the officers of the Connecticut Mutual Insurance Company that the policy No. 68430 was surrendered to the company on March 1st, 1879, and that the surrender value of said policy was applied by the company to the payment of the annual premium upon policies 68428 and 68429, due upon that date, and for the other purposes, as will appear by the inspection of Ex. C. It was admitted by the plaintiff that said Ellis and E. Rollins Morse, trustee, signed Exhibit C, and that the original was in the possession of the Connecticut Mutual Life Ins. Co. in Hartford, a copy being used at the trial without objection. It further appeared that on May 21st, 1879, said Ellis assigned said policy 68429 to the defendants, a copy of which assignment is hereto annexed, marked Exhibit E, and that Edwin Ray, the agent at Boston of the Connecticut Mutual Life Insurance Company, was notified by the defendant on June 5th, 1879, of said assignment, as set forth in the affidavit of Gerard C. Tobey on the back of Exhibit E, and that the said Ellis died on Nov. 21, 1879, and the defendants made the necessary proof of loss to the insurance company on or about Dec. 13, 1879, upon said policy 68429, and the insurance company
16 thereupon notified them that they had notice that the said policy had been assigned to E. Rollins Morse, of Boston, trustee, by the assignment, Ex. B; that said Morse, on Dec. 29th, 1879, executed the statement in writing to the insurance company (Ex. D), and that the general agent of the insurance company at Boston paid over to the administrator of said Ellis in one check, upon the joint receipt given by the administrator and the Ellis Foundry Company, by its treasurer, for the proceeds of policy 68429, & upon the receipt of Edward Avery, the administrator of said Ellis' estate, for the proceeds of policy 68428 and the balance due upon the surrender value of policy 68430 ($258.21) the sum of $18,780.86; that on the same day (Dec. 31, 1879) the said administrator paid the defendant corporation by his own check the sum of $5,901.64, which sum was the amount of the indebtedness of said Ellis to said corporation, of which $195.30 was contracted after the date of the assignment to the Ellis Foundry Company. The treasurer of the Ellis Foundry Company, as part of the proof and claim of the company against the insurance company, filed with the insurance company an affidavit that the assignment of May 21, 1879, by said Ellis to said Ellis Foundry was as collateral security for the payment of $5,540.14, with interest after the date of the assignment, and of any and all other sums which said Ellis might owe the Ellis Foundry Company within four years thereafter, and that at the time of his death he owed that company $5,540.14 and interest thereon, $166.20, and the further sum of $195.30, amounting altogether to $5,901.64,

and that the interest of that company in said policy 68429 as assigned was $5,901.64, and that he, the treasurer of said company, was legally authorized and entitled to receive that sum.

17 Horace W. Bates, the first assignee in bankruptcy of said Ellis, whose deposition was taken by the plaintiff, testified substantially as follows: That he was assignee in bankruptcy of the estate of said Ellis; that he had known said Ellis twelve years or more; that no assets of value came into his (said Bates') hands as assignee; that said Ellis did not disclose to him during the proceedings in bankruptcy any assets of value nor turn over to him while he acted as assignee any insurance policies; that said Ellis did not after he filed his petition in bankruptcy give him any information as to having any policies of insurance; that witness had known of his having had policies, but had reason to think that he had parted with them; that at one time previous to Ellis' bankruptcy he (witness) had learned of an assignment of some insurance to E. Rollins Morse, of Boston, and after bankruptcy proceedings witness could not learn that any interest in such policies remained vested in said Ellis in any way, and at the time of the bankruptcy proceedings he did not know that said Ellis had any interest in any policies of life insurance, and, having no reason to believe that said Ellis had any interest remaining in life insurance policies, he did nothing about them; that as assignee he had made no assignment or transfer of any policy of insurance; that he received no notice from the defendant as to any policies of insurance; that he never had any information that any policies were in existence or in the hands of the def't in which said Ellis had any interest at the time of filing his petition in bankruptcy; that he had given the defendant no authority or direction in any way in regard to any policies nor had he given the Connecticut Mutual Life Insurance Company any

18 directions or instructions concerning the same.

On cross-examination he testified that since Dec. 1, 1879, he had received letters from Joseph Pratt, perhaps three or four, and that after replying to said letters he destroyed them all, for the reason that it was not his practise to keep letters which did not at the time seem to be important; that his supposition was that Ellis had parted with all interest in any life insurance policies; that he knew he was unable to meet the premiums on all his policies, and that he understood that he had for a consideration assigned some of the policies; that he never had reason to suppose that Ellis' daughters were in any way interested in any policies, but that on the contrary his supposition was that they would derive absolutely no benefit from any insurance he had previously; that his impression was that Ellis, about 1865, had nearly or quite one hundred thousand dollars of life insurance. This was years before his bankruptcy. At many different times, up to 1873 or 1874, he heard Ellis speak of his insurance, and knew of his paying premiums on his life insurance before his assignment in bankruptcy; that Ellis told him, & he knew from seeing the policies, of his life insurance up to the year 1866. After that he heard him speak of it, the amount he had, and the amount of premiums; that many of his conversations

with Ellis occurred at the witness' residence and office in Kentucky, and witness thought that he was generally well informed as to Ellis' business matters generally, as he often talked with witness regarding them. These conversations occurred through several years, up to about 1876; that after 1873 or perhaps 1874 Ellis' business affairs were not in good condition and witness knew that Ellis was unable to con-
19 tinue the payment of his life insurance premiums; that witness had reason to think that Ellis had raised some means for his own and family expenses by assigning some of these insurance policies, and that the balance of his insurance had been cancelled or had lapsed; that he did not remember the year of Ellis' death; that he heard of it a few days after its occurrence by seeing it announced in a Massachusetts paper; that he supposed Ellis had made such disposition of his life insurance that his children would be left with nothing; that he had no reason to suppose that any assignment was for the benefit of Ellis' daughters or would be so held; that he supposed it would be the property of such parties as had advanced him money and had taken as their only security an assignment of some part of his life insurance; having no interest belonging to said Ellis or to his estate, that it was perhaps a year after Ellis' death that he first learned that Ellis' daughters had received or would receive some money, through E. Rollins Morse, from the proceeds of policies held by him; that witness had never understood that the policies was assigned to Morse for their benefit, but for money considerations.

Joseph Pratt, a creditor and brother-in-law of said Ellis, testified that he informed the assignee (Bates) in May, 1882, of the existence of the policy sued on.

The defendant offered evidence that the assignment of the policy was made by Ellis as security for Ellis' then indebtedness to the defendant, and also as collateral for future supplies, according to the terms of Exhibit F.

Edward Avery, the administrator of said Ellis' estate, was
20 called by the defendant, and testified as follows: That he didn't think he had any conversation with Bates while he was assignee; that he did have a conversation with him after he had resigned as assignee, a year ago the past summer, in August; that he had the conversation with him either at Niagara Falls or in that vicinity; it occurred while they were there; afterwards Bates made statements to him at his home, at Riverton, Ky.; Bates said he had given a deposition in the case; that he knew from Ellis; thinks the way he stated it was this: "Matt. told one about his policies of insurance, and that he had made an assignment of them or some of them to E. Rollins Morse. I knew that he was not able to pay his premiums and hadn't been for some months before he went into bankruptcy, and I took no steps or did nothing in regard to it whatever." It was referred to twice, and he said that he supposed that he, as assignee, had nothing to do with matters of life insurance, and that he had been substantially advised to that effect by the register in bankruptcy, before whom the proceedings were pending, and therefore he had taken no steps in regard to it; that this was the

substance of the conversation; as to part of it he had given the exact words.

It also appeared that the treasurer of the defendant corporation and also one of its directors and stockholders who took part in the negotiations by which the policy was transferred by Ellis to the defendant corporation on May 21, 1879, were both creditors of Ellis in bankruptcy and had proved their claims against his estate.

At the close of the evidence the defendant claimed the right to go to the jury and presented certain prayers for instructions which the court declined to give.

21 The court ruled that there was not sufficient evidence in the case to entitle the defendant to go to the jury, and also ruled as matter of law that upon the evidence in the case the plaintiff was entitled to recover from the defendant only the surrender value or the amount which the Connecticut Mutual Life Insurance Company would have paid the assignee in bankruptcy as the cash surrender value of the policy on the date of the filing of the petition in bankruptcy, to wit, July 3d, 1878, which sum it was agreed by the parties was $1,200, and instructed the jury to return a verdict for that sum, with interest from Dec. 31st, 1879, the date of the payment to the defendant by the administrator of the sum of $5,901.64, already mentioned.

The plaintiff, being aggrieved by the ruling of the court that he could recover only the surrender value of said policy at the date of filing the petition in bankruptcy, excepted thereto.

The jury found for the plaintiff in the sum of $1,614.44; to which the plaintiff excepted, and prays that his exceptions may be allowed.

By E. M. JOHNSON, *Of Counsel.*

27 October, 1885.

Allowed.

G. M. CARPENTER, *J.*

22 A.

Connecticut Mutual Life Insurance Company of Hartford, Conn.

No. 68429.

This policy of insurance witnesseth: That the Connecticut Mutual Life Insurance Company, in consideration of the declaration and representations made to them in the application for this insurance and the sum of three hundred and forty dollars and ninety cents to them in hand paid by Matthias Ellis, of Carver, Mass., and of the annual premium of three hundred and forty-four dollars and ninety cents, to be paid on or before the second day of March in every year during the continuance of this policy, do assure the life of Matthias Ellis, of Carver, in the county of Plymouth, State of Massachusetts, in the amount of ten thousand dollars, for the term of the whole continuance of his life. And the said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay or

Annual premium, $344.90.
Term of life.
Sum insured, $10,000.

cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said Matthias Ellis, deducting therefrom all notes taken for premiums unpaid at that date. And it is hereby conditioned and agreed that if at any time after three premiums have been paid on this
23 policy it shall be surrendered while yet in force the company will issue a paid-up non-forfeiture policy therefor for such an amount as the then present value of this policy would purchase as a single premium: Provided always and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Matthias Ellis shall die upon the seas or shall, without the consent of this company, previously obtained and endorsed upon this policy, pass either by sea or land beyond the settled limits of the United States (excepting by land or on lakes and rivers into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November; or shall, without such previous consent thus endorsed, visit California or Oregon or pass into the territories of the United States lying west of the twenty-first meridian of longitude from Washington; or shall, without such previous consent thus endorsed, enter into any military or naval service whatever (the militia not in actual service excepted); or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine or as fireman or brakeman upon a railroad, or as an officer, hand,
24 or servant of any steam vessel, or in the manufacture or transportation of gunpowder; or in case he shall become so far intemperate as to impair his health or induce delirium tremens, or shall die by his own hand or in a duel or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States or the United States or of any government where he may be, this policy shall be void, null, and of no effect.

And it is also understood and agreed to be the true intent and meaning hereof that if the proposals, answers, and declarations made by the said Matthias Ellis and bearing date the second day of March, 1867, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void; or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured or any part thereof, and this policy shall cease and determine.

And it is further understood and agreed that this poliay shall not take effect and become binding on said company until the premium above named shall be actually paid to said company or to some person authorized by them to receive it.

And it is further agreed that in every case when this policy shall cease or become or be null or void all previous payments made thereon and all dividend credits accruing therefrom shall be
25 forfeited to the said company.

In witness whereof the said Connecticut Mutual Life Insurance Company have, by their president and secretary, signed and delivered this contract in the city of Hartford this second day of March, one thousand eight hundred and sixty-seven, but the same shall not be binding until countersigned by W. S. Dunham, agent at New York, N. Y.

GUY R. PHELPS, *President.*

W. S. OLMSTED, *Secretary.*

Countersigned at New York this seventh day of March, 1867.

W. S. DUNHAM, *Agent.*

Endorsements.

Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be considered as acts of grace or courtesy, and in nowise to be construed as forming a precedent for future payments or a waiver of the forfeiture of the policy, according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due. Agents of the company are in no case authorized to make, alter, or discharge contracts or waiver forfeitures.

Proofs of deaths required.

1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease,
26 its duration, and the time of death.

2d. A certificate of a disinterested acquaintance of the deceased certifying to the time and fact of his death, and that he or she was the person insured by that name in this company.

3rd. A certificate from the undertaker, sexton, or clergyman who officiated at the funeral of the deceased and saw the body interred.

4th. A certificate from some intimate friend of the deceased of the age of the party at the time of his death.

These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.

The annual premium required to continue this policy in force must be paid on or before the date of the same, or the insurance ceases and the policy is void. The only evidence of payment of such premium which will be acknowledged by the company as valid and binding is a certificate of renewal signed by the secretary of the company. Certificates for this purpose will be furnished (for delivery to policy-holders) to those agents of the company who are authorized to collect premiums on account of the company; but as such authority is liable to frequent changes and subject to be revoked

without the knowledge of the insured, and as persons not so authorized may solicit payment of premium, representing that their receipt or endorsement will renew the policy, the policy-holders are cautioned not to pay renewal premiums to any person except upon de-
27 livery of a renewal certificate issued from the office of the company and signed by the secretary. This caution is important to policy-holders to prevent payments being made to irresponsible persons or those not authorized by the company to receive them, thereby not only losing the money paid but forfeiting the insurance also.

For the convenience of policy-holders the renewal certificate will be furnished to the agents through whom the policy was issued or at the location when it was last renewed, to be delivered upon the payment of the premium, unless otherwise directed by the insured; but the possession of the renewal certificate is the only evidence to the policy-holder of the authority of the agent to receive the premium.

No. 68429.

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

Assurance on the Life of Matthias Ellis.

Amount, $10,000.

Date March 2, 1867.
Term of life.

Annual premium	$344 90
Extra do.	
When due, 2 March.	
Cash part of payment	
Policy	1 00
Amount of note	
	$

The Conn. Lockwood & Brainard Co., printers, Hartford, Conn.

28 EXHIBIT B.

Copy of Assignment of Policies.

In consideration of one dollar to me paid by E. Rollins Morse, of Boston, the receipt of which is hereby acknowledged, I hereby transfer, assign, & set over to said E. Rollins Morse three policies of insurance on my life, issued by the Connecticut Mutual Life Insurance Company, dated March 2d, 1867, and numbered, respectively, 68428, 68429, & 68430, Nos. 68428 & 68429 being for the sum of ten thousand dollars each, and number 68430 being for the sum of five thousand dollars, and also all profits, dividends, non-forfeiture policies, money, or other property that may arise from or be paid for or on account of said policies:

To have & to hold the same unto the said Morse, but in trust, nevertheless, to pay over the income, profits, or proceeds of the said policies to my two daughters, Helena Forsyth Ellis and Marie Louise Ellis.

In witness whereof I have hereunto set my hand & seal this nineteenth day of May, A. D. 1877.

MATTHIAS ELLIS. [SEAL.]

Witness:
GEO. M. HOBBS.

EXHIBIT C.

Received of the Connecticut Mutual Life Insurance Co. of Hartford, Conn., the sum of ten hundred and fifty-four dollars, which is hereby acknowledged as a full consideration and satisfaction for all claims and demands which we have or may have under or on account of policy No. 68430, released, quitclaimed, surrendered,
29 and discharged to said company, said amount having been applied as follows:

In payment of 1879 premiums on policies Nos. 68428 & 68429	$495 20
Applicable in payment of future premiums on the same	249 28
In cancellation of premium note or credit	292
In cancellation of accrued interest on the same	17 52
Total as above	$1,054 00

MATTHIAS ELLIS.
E. ROLLINS MORSE, *Trustee.*

Dated at Boston this 1st day of March, A. D. 1879.

In the above margin is the following: Receipt for value to apply.

EXHIBIT D.

BOSTON, *December* 29, 1879.

DEAR SIR: I find no assignment to me of policies numbered 68428 & 68429, on the life of Matthias Ellis, issued by your company, and I do not claim any interest in the same.

Yours respectfully, E. ROLLINS MORSE.

To the president, &c., of the Connecticut Mutual Life Insurance Company of Hartford, Conn.

30 EXHIBIT E.

Know all men by these presents that I, Matthias Ellis, whose life is insured by policy numbered 68429 in the sum of ten thousand dollars, issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for value received by me of the Ellis Foundry Company, a corporation located at Carver, Massachusetts, the receipt whereof is hereby acknowledged, do hereby assign, trans-

fer, & set over to said Ellis Foundry Company, its successors and assigns, said policy of insurance and all my right thereunder, and all moneys payable or which may be payable thereon.

Witness my hand and seal this twenty-first day of May, A. D. eighteen hundred and seventy-nine.

MATTHIAS ELLIS. [SEAL.]

In presence of—
JOHN S. CARTER.

I, Gerard C. Tobey, of Warehem, Massachusetts, certify and declare that on this fifth day of June, A. D. 1879, I personally delivered into the hand of Edwin Ray, the agent of the within-named Connecticut Mutual Life Insurance Company, at his office on Washington street, in Boston, Massachusetts, this instrument, and that in my presence he read the same and replied to me that notice of the within assignment was not required under the law and rules of said company.

Witness my hand this fifth day of June, in the year eighteen hundred and seventy-nine.

GERARD C. TOBEY.

31 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

JUNE 9, 1879.

Then personally appeared the above-named Gerard C. Tobey and solemnly swore that the above-written certificate by him substituted [subscribed] is true.

Before me—

ANDREW C. FEARING,
Justice of the Peace.

EXHIBIT F.

CARVER, *May* 21, *A. D.* 1879.

The Ellis Foundry Company hereby acknowledge that they have received of Matthias Ellis an assignment of policy numbered 68429, issued to him by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and that said Ellis Foundry Company have received it as collateral security for the payment by said Matthias Ellis to said Ellis Foundry Company of the sum of five thousand five hundred & forty $\frac{14}{100}$ within one year from March 1st, 1879, with interest thereon from the date hereof, being the amount of the debt specified in a writing dated this day, signed by said Matthias Ellis, and said policy being received as collateral security also for the payment of any and all other sums of money which said Matthias Ellis may owe said Ellis Foundry Company within four years from the date hereof.

ELLIS FOUNDRY COMPANY.
PELEG McFARLIN, *Treasurer.*

A true record.
Attest: JOHN G. STETSON, *Clerk.*

3—160

32 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled William W. Cleary, assignee, *v.* Ellis Foundry Company, lately determined in said circuit court, and of all proceedings therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

33 *Bond on Writ of Error.*

Know all men by these presents that we, George B. Fowler and P. Francis Wells, both of Boston, in the Commonwealth of Massachusetts, are held and firmly bound unto the Ellis Foundry Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual places of business at Carver and Boston, in said Commonwealth, in the full and just sum of five hundred dollars, to be paid to the said Ellis Foundry Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twelfth day of November, in the year of Lord one thousand eight hundred and eighty-five.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between William W. Cleary, of Covington, in the State of Kentucky, assignee in bankruptcy of the estate of Matthias Ellis, of Carver, Massachusetts, judgment was rendered against the said Ellis Foundry Company for a sum less than the sum claimed by said plaintiff; and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ellis Foundry Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Cleary, assignee, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be null and void; otherwise to remain in full force and virtue.

GEORGE B. FOWLER. [L. S.]

Signed, sealed, and delivered in presence of—
P. FRANCIS WELLS. [L. S.]

Approved.
LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:
JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

34 *Citation.*

The United States of America to The Ellis Foundry Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its usual places of business at Carver and Boston, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein William W. Cleary, of Covington, in the State of Kentucky, assignee in bankruptcy of the estate of Matthias Ellis, of Carver, Massachusetts, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered for the said plaintiff in error for a sum less than the sum claimed by said plaintiff, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, United States circuit judge for first judicial circuit, this twelfth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

We accept service of the foregoing citation.
ELLIS FOUNDRY CO.,
By BALL, STOREY & TOWER,
Their Att'ys.

35 *Assignment of Errors and Prayer for Reversal.* (*Filed Sept.* 18, 1886.)

Circuit Court of the United States, District of Massachusetts.

WILLIAM W. CLEARY, Assignee,
v.
THE ELLIS FOUNDRY COMPANY. } No. 1963, Law Docket.

And now comes William W. Cleary, assignee, the plaintiff in the above-entitled action, and assigns as errors the following, to wit:

First. That the court should have ruled that the plaintiff was entitled to recover in this action the entire amount paid by the insurance company on account of its liability under policy No. 68429, to wit, the sum of $9,390.43, and interest thereon from the date of said payment.

Second. That the court should have ruled that the plaintiff was entitled to recover the amount of money actually received by the defendant from the insurance company on account of policy No. 68429, to wit, the sum of $5,901.64, and interest thereon.

Third. That the court ruled that the plaintiff was entitled to receive from the defendant only the surrender value or the amount which the Connecticut Mutual Life Insurance Company would have paid the assignee in bankruptcy as the cash surrender value on the date of the filing of the petition in bankruptcy, whereas such
36 ruling and direction should not have been given.

Wherefore he prays that the decision of the court may be reversed.

WILLIAM W. CLEARY, *Assignee*,
By E. M. JOHNSON, *Of Counsel.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

Endorsed on cover: Massachusetts C. C. U. S. No. 160. William W. Cleary, assignee in bankruptcy of Matthias Ellis, plaintiff in error, *vs.* The Ellis Foundry Company. Filed October 12, 1886.

Office Supreme Court U. S.
FILED,
DEC 7 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 160. **October Term, 1889.**

WILLIAM W. CLEARY,

Assignee in Bankruptcy of ***MATTHIAS ELLIS,***

Plaintiff in Error,

v.

THE ELLIS FOUNDRY COMPANY.

Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR PLAINTIFF IN ERROR.

NATHAN MORSE,
E. M. JOHNSON,
Plaintiff's Attorneys.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL, 39 ARCH STREET.
1889.

Supreme Court of the United States.

No. 160. October Term, 1889.

WILLIAM W. CLEARY, Assignee in Bankruptcy of MATTHIAS ELLIS, Plaintiff in Error,

v.

THE ELLIS FOUNDRY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

Brief Statement of Case.

This is an action at law in which the plaintiff, as assignee in bankruptcy of Matthias Ellis, late of Carver, Mass., seeks to recover from the defendants the sum of $9,390.43 and interest, being the proceeds of a policy of insurance on the life of the said Ellis, issued by the Connecticut Mutual Life Insurance Company, of Hartford, Conn., which was collected by the defendant corporation on or about Jan. 1, 1880.

The writ was dated Sept. 30, 1882. The defendants answered by a general denial, and also pleaded "that if the plaintiff or H. W. Bates, mentioned in the plaintiff's declaration (the former assignee in bankruptcy of the estate of said Ellis), ever had any cause of action against this defendant either upon the alleged cause of action set forth in the plaintiff's declaration, or any of them, or otherwise, which this defendant denies, this suit was not brought within two years from the time when such alleged cause of action, or such alleged causes of action, accrued." (Record, p. 4.)

The case was heard before Carpenter, J., and a jury, at the May term, 1885, of the Circuit Court; and the jury, under the instructions of the Court, returned a verdict for the plaintiff in the sum of $1,614.44; and the plaintiff being aggrieved by the ruling of the Court, duly excepted thereto, and filed a bill of exceptions, which was duly allowed by the Court. (Record, pp. 7–12.)

Statement of Facts.

Mathias Ellis, of Carver, Mass., filed his petition in bankruptcy in the District Court of the United States, for the District of Kentucky, on July 3, 1878, and one Horace W. Bates, of Riverton, Ky., was duly elected his assignee on Aug. 6, 1878, and continued to act as such assignee until June 6, 1882, when he resigned, and the plaintiff was duly appointed and qualified as assignee in his stead. (Record, p. 5.)

The schedule of assets filed in said cause was duly signed and sworn to by said Ellis and disclosed no assets of value, except certain articles claimed as exempt; and neither under the head of "Schedule B (3)," nor in any other part of his schedule of assets, did he mention any policy of insurance. (Record, p. 5.)

The said Ellis at one time, some years prior to the date of his petition in bankruptcy, had obtained a large amount of insurance on his life, but he had been for some years unable to pay the annual premiums, and the policies had many of them lapsed. March 2, 1867, he had obtained from the Connecticut Mutual Life Insurance Company three policies on his life, Nos. 64,428, 68,429, 68,430; Nos. 68,428 and 68,429 being for the sum of ten thousand dollars each, and 68,430 being for the sum of five thousand dollars. A copy of 68,429 is annexed and marked Exhibit A. (Report, p. 12.)

Policy No. 68,430 was surrendered to the insurance company by Ellis, March 1, 1879, for the sum of $1,054, which was applied in part to the payment of the 1879 premiums on the two policies 68,428 and 68,429. See Exhibit C. (Report, p. 16.)

It appeared on the death of Ellis that the insurance company had in their possession an assignment of said three policies of insurance from said Ellis to E. Rollins Morse, of Boston, dated May 19, 1877, in trust to pay over the income, profits, or proceeds of the said policies to his (said Ellis) two daughters, Helena Forsyth Ellis and Marie Louise Ellis; but said Morse testified that he did not think he ever had in his possession or saw the paper (Exhibit B); that the firsttime he knew or had reason to believe that a paper purporting to be an assignment of the policies was in existence, was when he was called upon by the treasurer of the defendant corporation, who said that the company declined to pay him the money on the policy unless he (Morse) stated that he had no claim under that policy.

It appeared that for several years prior to the date of his petition in bankruptcy Ellis had been owing a large amount of money, including a number of executions, and had repeatedly, when pressed for money, between 1874 and 1877, said that he was unable to pay, and that a large part of his indebtedness was contracted between 1869 and 1874. (Report, p. 6.)

On May 21, 1879, said Ellis assigned said policy No. 68,429 to the defendants, who notified the agent of the insurance company at Boston of said assignment. Ellis died Nov. 21, 1879, and the defendants made proof of loss of said policy 68,429 on Dec. 13, 1879, and the insurance company thereupon notified them that they had notice that the said policy had been assigned to E. Rollins Morse, of Boston, trustee, by said assignment Exhibit B; that said Morse, on Dec. 29, 1879, executed the statement in writing (Exhibit D, Record, p. 16) to the company, to the effect that he found no assignment to him of policies numbered 68,428 and 68,429 on the life of Matthias Ellis, issued by the company, and did not claim any interest in the same; and thereupon the general agent of said insurance company at Boston paid over to Edward Avery, the administrator of said Ellis' estate in one check upon the joint receipt of the administrator and the defendant corporation by its treasurer, for the proceeds of policy No. 68,429, and upon the receipt of said administrator, for the proceeds of policy No. 68,428, and the balance due upon the surrender value of policy No.

68,430 ($258.71), the sum of $18,780.86; and on the same day the said Avery paid the defendant the sum of $5,901.64, which sum was the amount of the indebtedness of said Ellis to the defendant, of which sum $195.30 was contracted after the date of the assignment (May 21, 1879). (Record, p. 9.)

Horace W. Bates, the first assignee in bankruptcy, testified that no assets of value came into his hands as assignee, and that said Ellis did not disclose to him during the proceedings in bankruptcy any assets of value, nor turn over to him any insurance policies, nor did he give him any information as to having any policies of insurance; that he did not know that said Ellis had any interest in any policies of life insurance, and having no reason to believe that said Ellis had any interest remaining in life-insurance policies he did nothing about them. That he was never informed that any policies were in existence or in the hands of the defendant in which said Ellis had any interest at the time of filing his petition in bankruptcy, and he had given the defendant no authority or direction in any way in regard to any policies, nor had he given the insurance company any directions or instructions concerning the same. That after 1873 or 1874 Ellis' business affairs were not in good condition, and he knew that Ellis was unable to continue the payment of life-insurance premiums, and had reason to think that Ellis had raised some means for his own and family expenses by assigning some of these insurance policies, and that the balance of his insurance had been cancelled or had lapsed. (Record, p. 10.)

The treasurer of the defendant corporation, and also one of its directors and stockholders, who took part in the negotiations by which the policy was transferred by Ellis to the defendant corporation, were both creditors of Ellis in bankruptcy and had proved their claims against his estate. (Record, p. 12). The Court ruled as matter of law (Record, p. 12), that upon the evidence in the case the plaintiff was entitled to recover from the defendant, only the surrender value, or the amount which the life-insurance company would have paid the assignee in bankruptcy as the cash surrender value of the policy on the date of the filing of the petition in bankruptcy, to wit, July

3, 1878, and instructed the jury to return a verdict for that sum with interest from Dec. 31, 1879, the date when the administrator of Ellis paid the defendant corporation the sum of $5,901.64 before mentioned. To this ruling the plaintiff excepted.

ASSIGNMENT OF ERRORS. (Record, p. 20,)

First. Because the Court should have ruled that the plaintiff was entitled to recover in this action the entire amount paid by the insurance company, on account of its liability under policy No. 68,429; to wit, the sum of $9,390.43, and interest thereon from the date of said payment.

Second. That the Court should have ruled that the plaintiff was entitled to recover the amount of money actually received by the defendant from the insurance company, on account of policy No. 68,429; to wit, the sum of $5,901.64 and interest thereon.

Third. That the Court ruled that the plaintiff was entitled to recover from the defendant only the surrender value, or the amount which the insurance company would have paid the assignee in bankruptcy as the cash surrender value on the date of the filing of the petition in bankruptcy, whereas such ruling and directions should not have been given.

BRIEF OF ARGUMENT.

The plaintiff in error claims that the Court below erred in instructing the jury that he could recover only the surrender value, or the amount which the Connecticut Mutual Life Insurance Company would have paid the assignee in bankruptcy as the cash surrender value of the policy on the date of the filing of the petition in bankruptcy, to wit, July 3, 1878; and that as matter of law, upon the evidence, the Court should have ruled that the plaintiff was entitled to recover, either the total amount paid by the company upon the policy and interest thereon, or the amount of money actually received by the defendant on the policy, to wit, the sum of $5,901.64 and interest thereon; and that because of the ruling, the ruling of the Court below should be reversed.

I.

The policy of insurance was an assignable chose in action, was the property of Ellis, and had a market value at the date of his bankruptcy.

Palmer *v.* Merrill, 6 Cush., 282.
St. John *v.* American Ins. Co., 3 Kernan, 31.
Anthracite Ins. Co. *v.* Sears, 109 Mass., 383.

All the estate of the bankrupt, both real and personal, passed to the assignee by the assignment.

Revised Statutes of U. S., § 5,044.

When a policy holder has been adjudged bankrupt, the policy becomes absolutely vested in the assignee, and he has like remedies to recover the same, as the bankrupt would have if he had not been adjudged a bankrupt. He has, in addition, the right to set aside a fraudulent transfer of the policy.

Vetterlein *v.* Barnes, 124 U. S., 169.
In re Newland, 7 Ben., 63.
West *v.* Reid, 2 Hare, 249.
Bunyon on Life Ins. (2d ed.), 211.
Brigham *v.* Home Life Ins. Co., 131 Mass., 319.

2. It is submitted that if the policy of insurance belonged to the assignee in bankruptcy, as the Court must have held in order to enable the plaintiff to recover anything in this action, then all benefit and possibilities of benefit under the policy also belonged to the assignee in bankrupcy.

Schondler *v.* Wace, 1 Camp., 487.
Owen on Bankruptcy, p. 81.

The defendant's claim on this policy was derived from the bankrupt under an assignment dated May 21, 1879.

The policy was assigned to secure an old debt, and the only claim of title in the defendant is under this assignment, which

passed no title as against the plaintiff, and yet, though it had no title as against the plaintiff, the defendant, if the ruling below is correct, is by law entitled to retain the greater part of the proceeds of the policy.

It is true that if the assignee had received the policy from Ellis, as he was entitled to do, he would have been justified in surrendering it to the insurance company, and could have received from it, not the surrender value at the time when his title accrued, but the surrender value *at the time when he surrendered it.* And it is also true that if the defendant had surrendered the policy during the lifetime of Ellis, that the amount which the assignee could then recover would be the amount which the defendant received as such surrender value; but neither of these events happened in this case. The assignee did not obtain the policy, and so could not surrender it. The defendant did obtain the policy, against the right of the assignee, and did not surrender, but did retain it until the death of Ellis, when the policy became worth its face.

In many cases where a life-insurance policy is held for the benefit of another, and an assignment is made without right, it has been held that the beneficiary is entitled to recover *the proceeds of the policy* less any premiums paid by the assignee under the belief that he had a good title.

Unity Assn. *v.* Dugan, 118 Mass., 219.
Conn. Ins. Co. *v.* Burroughs, 34 Conn., 305.
Same *v.* Westervelt, 52 Conn., 586.
Frank *v.* Mut. Life Ins. Co., 102 N. Y., 266.
Harley *v.* Heist, 86 Ind., 196.
Weisert *v.* Muehl, 81 Ky., 336.

But the defendant has paid no premiums on this policy.

So in other analogous cases where the rule of damages as to the value of the policy, as a running policy, would be the surrender value of the policy at a certain date; yet when the assured has died subsequently, it is held that the amount of damage is now certain, which before was uncertain and largely speculative, and the damage is the present value of the full amount

of the policy; and this has been held where death has occurred after suit brought.

Clemmitt *v.* N. Y. Life Ins. Co., 76 Va., 355.
People *v.* Security Life Ins. and An. Co., 78 N. Y., 114, 129.

II.

But this policy was kept alive by the use of assets belonging to the estate of the bankrupt; *i.e.*, by the application of a part of the surrender value of policy No. 68,430 to pay the annual premium on policy No. 68,429, due March 2, 1879. (Exhibit C, p. 16.)

It sufficiently appears that policy No. 68,430 also belonged to the bankrupt's estate, and passed to his assignee in bankruptcy under the assignment since.

1. The bankrupt undertook to assign it to Morse as trustee for the benefit of his daughters, in the same instrument, and under precisely the same terms as the policy in this case. (Exhibit B, Record, p. 15.)

2. It was surrendered to the company, and all claims thereunder released and discharged by the bankrupt and Morse, trustee, alone, no other person appearing interested, and the amount of the surrender value applied to pay premiums on the two policies Nos. 68,428 and 68,429. (Exhibit C, p. 16.)

3. The balance due upon the surrender value of policy No. 68,430 was paid to Ellis' administrator. (Record, p. 9.)

A policy and the money to become due under it belongs the moment it is issued to the person or persons named in it, as the beneficiary or beneficiaries, and there is no power in the person procuring the insurance by any act of his, to transfer to any other person the interest of the person named.

Central Bank of Washington *v.* Hume, 128 U. S., 195.
North America Life Ins. Co. *v* Wilson, 111 Mass., 542.
Campbell *v.* N. E. Ins. Co., 98 Mass., 381, 400.

III.

It is not conceded that, if the bankrupt had turned over the policies to his assignee in bankruptcy, he could not have used the funds of the estate to pay premiums. That would depend on the circumstances of the case, the wish of the creditors, and the orders of the Court of Bankruptcy. The assignee would stand precisely like any other trustee in this respect. If the creditors asked it, he would be fully justified in keeping the policies alive. The policy in this case was, in fact, kept alive by the surrender of another policy belonging to the assignee, so that the funds of the estate were really used for this purpose.

The plaintiff insists that, under the assignment in bankruptcy, he became the absolute owner of the policies entitled to all the rights of such ownership, and that to hold that his only right or interest was the right to receive the surrender value of the policies, what the insurance company would have been willing to give for them in cash, as of the date of the petition in bankruptcy, was incorrect as a matter of law.

IV.

The Court should have ruled that the plaintiff was entitled to recover in this action from this defendant the entire proceeds of policy No. 68,429.

An assignment of a policy to a creditor, made by a party having a right to assign, carries the entire policy and the right to recover from the company for the whole amount due thereon.

Burroughs *v.* State Mut. Life Ins. Co., 97 Mass., 359.
Bailey *v.* New England Ins. Co., 114 Mass., 177.

The defendant had the policy in his possession at the time of the bankrupt's death, and the insurance company paid the full amount due on the policy upon the joint receipt of the defendant and the bankrupt's administrator. The defendant undertook to divide the proceeds of the policy with the administrator, and wrongfully allowed the administrator, to whom he was not bound to pay anything, to retain a part of the money.

This is an action for money had and received, and under it the plaintiff can recover from the defendant the full amount paid on the policy, irrespective of any disposition which he (the defendant) may have made of the funds.

1 Chitty Pl., 16th Am. ed., 365 *et seq.*
2 Chitty on Contracts, 11th Am. ed., 898 *et seq.*
2 Greenl. Evid. § 101, *et seq.*
Note to Marriot *v.* Hampton, 2 Smith's L. C., 393.
Notley *v.* Buck, 8 B. & C., 160.

The action will lie

(*a*) Upon any implied promise to pay money to the person entitled to receive it, however the holder may have come by it, and although he may have parted with it.

Hindmarch *v.* Hoffman (Penn.), 18 Atl. Rep., 14.
Cary *v.* Curtis, 3 How., 236.
Jewett *v.* Cunard, 3 Wood & M., 277.
Gould *v.* Emerson, 99 Mass., 154.
Seavey *v.* Dana, 61 N. H., 339.
Met. Bank *v.* Jersey City N. Bank, 19 Fed. Rep., 301.

(*b*) Money collected without authority may be recovered by the person entitled to it in this action.

O'Conley *v.* Natchez, 1 Sm. & M., 31.

(*c*) The proceeds of goods improperly received or held, after a reasonable time, may be recovered without proof of actual sale.

Longchamp *v.* Kenny, Dougl., 138.
Ayres *v.* Sleeper, 7 Metc., 46.
Langley *v.* Sturtevant, 7 Pick., 214.
Eaton *v.* Welton, 32 N. H., 352.

(*d*) Actual receipt of the money is not necessary. It is sufficient if the money is constructively received — as when an agent to collect a debt credits it to his principal as paid, with

the debtor's consent, and charges it to the debtor in his private account, he may maintain assumpsit against the debtor.

Emerson *v.* Baylies, 19 Pick., 55.
Appleton *v.* Bancroft, 10 Met., 236, 237.

(2) The defendant, having cancelled the insurance policy which belonged to the plaintiff, is liable for its conversion and full value.

Pratt *v.* Vizard, 5 B. & Ad., 808.
Billing *v.* Ries, Car. & M., 26.
Gilmore *v.* Wilbur, 12 Pick., 120.
Ripley *v.* Gelston, 9 Johns., 201.
Vaughan *v.* Matthews, 13 Q. B., 187.

(3) After the bankrupt's death, the defendant held the policy as money, and is liable for its value in this action.

Pickard *v.* Bankes, 13 East, 20.
Spratt *v.* Hobhouse, 4 Bing., 173, 179.

A *mere admission* that the defendant holds money's worth, or value in money, to which the plaintiff is entitled, will sustain the action.

Hennings *v.* Rothschild, 4 Bing., 315.
Spratt *v.* Hobhouse, 4 Bing., 173.
Howell *v.* Batt, 5 B. & Ad., 504.
Hopkins *v.* Orr, 124 U. S., 510, 513.

(4) The defendant had full control of the policy and of all its value after the bankrupt's death. By giving away part of the demand he could not defeat his liability for the assigned claim under his exclusive control, and for which he was accountable. It is not necessary that he should have actually received the money.

Risdon *v.* De La Rua, 19 Jones & Spencer (N. Y.), 63, 68; affirmed, 98 N. Y., 653.
Rosenberg *v.* Block, 22 Jones & Spencer, 537.

(5) The defendant's treasurer was bound to know that the title to the policy was in the plaintiff, and that the entire pro-

ceeds belonged to him. If he saw fit to collect the policy from the company, he was bound to hold the entire amount which the company paid upon it in trust for the true owner, *i.e.*, for the plaintiff.

V.

But if the Court shall hold that the defendant is not liable for the entire proceeds of the policy No. 68,429, then it is submitted that there is no dispute that the sum of $5,901.64 was actually paid over to the defendant and received by it as a part of the proceeds of this policy, and that this sum in equity and good conscience belongs to the assignee in bankruptcy and not to the defendant, and that the assignee may recover that sum and interest thereon, and that the Court below should have given that instruction to the jury.

VI.

The ruling of the Court below was probably based upon the theory that the defendant converted this policy and would be liable under the rule in Massachusetts only for its market value at the time of the conversion; but the action is not *tort*, but *contract;* it does not seek to recover the policy or damages for its conversion but to obtain under the action for money had and received money which in equity and good conscience belongs to the plaintiff, which the defendant has, as the proceeds of his conversion; the amount to be recovered is not damages but a definite sum, easily defined and traced, actually received from this source.

(2) The defendant took the policy as collateral security, and there was no conversion until after the death of Ellis, when it cancelled the policy, and appropriated to its own use the money due thereon, and its value at that time should be the measure of damages.

E. M. JOHNSON,
Of Counsel.

Office Supreme Court U. S.
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CLERK.

Supreme Court of the United States.

No. 160. October Term, 1889.

WILLIAM W. CLEARY,

Assignee in Bankruptcy of ***MATTHIAS ELLIS,***

Plaintiff in Error,

v.

ELLIS FOUNDRY COMPANY,

Defendant in Error.

BRIEF OF JOSHUA D. BALL,

In behalf of Defendant in Error.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL, NO. 39 ARCH STREET.
1889.

Supreme Court of the United States.

No. 160. October Term, 1889.

WILLIAM W. CLEARY, Assignee in Bankruptcy of MATTHIAS ELLIS, Plaintiff in Error.

v.

ELLIS FOUNDRY COMPANY, Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error, who was plaintiff in the Court below, seeks to recover $9,390\frac{43}{100}$, alleged to have been collected by the defendant on or about Jan. 1, 1880, under policy No. 68,429, issued by the Connecticut Mutual Life Insurance Company, on the life of Matthias Ellis, and interest on that sum to Oct. 1, 1882. The writ was dated Sept. 30, 1882.

Pages 2, 3.

The policy was dated March 2, 1867, was for the sum of $10,000 for the term of the whole continuance of Matthias Ellis' life. The annual premium to be paid was $\$344\frac{90}{100}$.

Exhibit A, page 12.

Matthias Ellis, March 2, 1867, obtained this policy No. 68,429, and policies No. 68,428 and No. 68,430, the last-mentioned policy being for $5,000, and each of the others for $10,000.

Page 5, near end.

An assignment was made May 19, 1877, by Matthias Ellis, of these three policies to E. Rollins Morse, in trust for the assignor's two daughters, Helena Forsyth Ellis, and Marie Louise Ellis.

Exhibit B, pages 15, 16.

Matthias Ellis filed his petition in bankruptcy in the District Court of the United States for the District of Kentucky, July 3, 1878, and Horace W. Bates, of Riverton, Ky., was duly elected his assignee on Aug. 6, 1878.

Page 5.

March 1, 1879, Matthias Ellis and the assignee of the policies, E. Rollins Morse, trustee, surrendered for the sum of $1,054, the policy No. 68,430, and that sum was applied as follows, viz. : —

In payment of 1879 premiums on policies Nos. 68,428 and 68,429	$495.20
Applicable in payment of future premiums on same .	249.28
In cancellation of premium note or credit . . .	292.00
In cancellation of accrued interest on same . . .	17.52
	$1,054.00

Exhibit C, pages 16, 9.

May 21, 1879, Matthias Ellis assigned policy No. 68,429 to the defendant in error as collateral security for the payment by him to the defendant in error of $5,540\frac{14}{100}$ within one year from March 1, 1879, with interest thereon from the date of the assignment, being the amount of the debt specified in a writing dated May 21, 1879, signed by said Matthias Ellis, and also as collateral security for the payment of any and all other sums of money which said Matthias Ellis should owe the defendant in error within four years from May 21, 1879.

Exhibits E and F, pages 16, 17, 11, 9.

The insurance company was notified of this assignment June 5, 1879.

Pages 9 and 17.

It appeared at the trial that the treasurer of the defendant, and also one of its directors and stockholders who took part in the negotiations by which the policy was transferred by Ellis to the defendant on May 21, 1879, were both creditors of Ellis in bankruptcy, and had proved their claims against his estate.

Page 12.

Matthias Ellis died Nov. 21, 1879, according to the proof.

Page 9.

This was more than sixteen months after his petition in bankruptcy was filed.

The defendant in error made necessary proof of death on or about Dec. 13, 1879, under said policy No. 68,429, and the insurance company thereupon notified it, that the insurance company had notice that said policy had been assigned to E. Rollins Morse, of Boston, trustee by the assignment Exhibit B.

Pages 9, 15.

Said Morse, Dec. 29, 1879, executed the statement in writing to the insurance company marked "Exhibit D," in which he stated that he did not claim any interest in the policy.

Pages 9, 16.

The general agent of the insurance company at Boston paid over to the administrator of said Matthias Ellis in one check, upon the joint receipt given by the administrator and the Ellis Foundry Company, by its treasurer, for the proceeds of policy No. 68,429, and upon the receipt of the administrator for the proceeds of policy No. 68,428, and for the balance due upon the surrender value of policy No. 68,430 ($258.21), the sum of $18,780.86; and on the same day (Dec. 31, 1879), said administrator paid to the Ellis Foundry Company, by his own check, $5,901.$\frac{64}{100}$, which sum was the amount of the indebtedness of said Matthias Ellis to that company, 195\frac{30}{100}$ of which was contracted after the date of the assignment to that company. The treasurer of that company, as part of the proof and claim of that company against the insurance company, filed with the insurance company an affidavit that

the assignment of May 21, 1879, by said Matthias Ellis to said Ellis Foundry Company, was as collateral security for the payment of $5,540\frac{14}{100}$, with interest, after the date of the assignment, and of any and all other sums which said Matthias Ellis might owe the Ellis Foundry Company, within four years thereafter; and that at the time of his death he owed that company $5,540.14 and interest thereon ($166.20), and the further sum of $195.30, amounting altogether to $5,901.64; and that the interest of that company in said policy No. 68,429, as assigned, was $5,901.64; and that he, the treasurer, was legally authorized and entitled to receive that sum.

Pages 9, 10.

It will thus be observed that the defendant received not the whole amount of the policy but only $5,901.64.

June 6, 1882, Bates, the assignee in bankruptcy of Matthias Ellis, resigned, and the plaintiff, William W. Cleary, was appointed and qualified as assignee in his stead.

Page 5.

The plaintiff showed that said Matthias Ellis had, for several years prior to the date of his petition in bankruptcy, been owing a large amount of money ($150,000), including a number of executions, and produced witnesses who testified that a large part of the indebtedness was contracted between 1869 and 1874, and that said Matthias Ellis had, between 1874 and 1877, repeatedly, in response to repeated demands, said he was unable to pay.

Page 6.

At the close of the evidence, the defendant claimed the right to go to the jury, and presented certain prayers for instructions, which the Court declined to give. The Court ruled that there was not sufficient evidence in the case to entitle the defendant to go to the jury, and also ruled as matter of law, that upon the evidence in the case the plaintiff was entitled to recover from the defendant only the surrender value or the amount which the insurance company would have paid the assignee in bankruptcy as the cash surrender value of the policy on the date of the filing the petition in bankruptcy, to

wit, July 3, 1878, which sum it was agreed by the parties was $1,200, and instructed the jury to return a verdict for that sum with interest from Dec. 31, 1879, the date of the payment to the defendant by the administrator of the sum of $5,901.64, already mentioned. The plaintiff excepted to the ruling that he could recover only the surrender value. The jury found for the plaintiff in the sum of $1,614.44, to which the plaintiff excepted.

Page 12.

The amount of the verdict was the amount for which the Court directed the jury to return the same, and was not sufficient to support a writ of error by the defendant.

THE PLAINTIFF ASSIGNS AS ERRORS,

1. That the Court should have ruled that the plaintiff was entitled to recover the entire amount paid by the insurance company on account of its liability under the policy No. 68,429; to wit, $9,390.43 and interest thereon from the date of the payment.

2. That the Court should have ruled that the plaintiff was entitled to recover the amount of money actually received by the defendant from the insurance company on account of that policy; to wit, $5,901.64 and interest thereon.

3. That the Court ruled that the plaintiff was entitled to recover only the surrender value of the policy on the day of the filing of the petition in bankruptcy.

Page 20.

BRIEF OF DEFENDANT'S ARGUMENT.

I. The defendant claims that the ruling of the Court was too favorable to the plaintiff, and that no verdict at all should have been directed for the plaintiff; and that if the ruling was as favorable as, or more favorable than, the plaintiff was entitled to, the judgment must be affirmed.

II. The plaintiff, in order to recover anything, must stand upon his own title; he must, if he can recover at all, recover upon the strength of his own title.

III. If the defendant was entitled to the money, or any person other than the plaintiff was entitled to it, the plaintiff cannot recover. He must recover upon the strength of his own title and not upon the weakness of defendant's title.

a. If E. Rollins Morse, as trustee for the two daughters of Matthias Ellis, or these two daughters were entitled to the money, then the plaintiff could recover nothing.

b. Matthias Ellis, on March 2, 1867, had obtained from the insurance company the three policies, Nos. 68,428, 68,429, and 68,430, the last mentioned being for $5,000; and each of the others for $10,000. This was more than eleven years before July 3, 1878, the day on which he filed his petition in bankruptcy in Kentucky. His home was in Carver, Massachusetts.

Page 5.

The policies 68,428 and 68,429, the bill of exceptions recites, were alike.

Page 6.

A copy of the policy in question here, No. 68,429, is annexed.

Exhibit A, pages 6 and 12.

c. "It appeared from the testimony of the officers of the Connecticut Mutual Life Insurance Company that they had in their possession an assignment of the three policies, a copy of which said assignment is hereto annexed, and marked 'Ex. B.'"

Page 6.
Exhibit B, page 15.

That assignment is as follows, viz.: —

"In consideration of one dollar, to me paid by E. Rollins Morse,

of Boston, the receipt of which is hereby acknowledged, I hereby transfer, assign, and set over to said E. Rollins Morse three policies of insurance on my life, issued by the Connecticut Mutual Life Insurance Company, dated March 2, 1867, and numbered respectively, 68,428, 68,429, and 68,430 — Nos. 68,428 and 68,429 being for the sum of ten thousand dollars each, and number 68,430 being for the sum of five thousand dollars; and also all profits, dividends, non-forfeiture policies, money, or other property that may arise from, or be paid for or on account of, said policies. To have and to hold the same unto the said Morse, but in trust, nevertheless, to pay over the income, profits, or proceeds of the said policies to my two daughters, Helena Forsyth Ellis and Marie Louise Ellis.

In witness whereof I have hereunto set my hand and seal this nineteenth day of May, A.D. 1877.

MATTHIAS ELLIS. [SEAL.]

Witness:
GEO. M. HOBBS."

IV. The plaintiff undertook to show that the assignment to E. Rollins Morse, trustee, had never been in Morse's possession, and that Morse had not acted under it. Neither of these positions was sustained by the evidence.

a. "It was admitted by the plaintiff that said Ellis and E. Rollins Morse, trustee, signed Exhibit C, and that the original was in the possession of the Connecticut Mutual Life Insurance Company in Hartford, a copy being used at the trial without objection."

Pages 9, 16.

Exhibit C is as follows: —

"Received of the Connecticut Mutual Life Insurance Company, of Hartford, Conn., the sum of ten hundred and fifty-four dollars, which is hereby acknowledged as a full consideration and satisfaction for all claims and demands which we have or may have under or on account of policy No. 68,430 released, quitclaimed, surrendered, and discharged to said company, said amount having been applied as follows: —

In payment of 1879 premiums on policies Nos. 68,428 and 68,429	$495.20
Applicable in payment of future premiums on the same .	249.28
In cancellation of premium note or credit . . .	292.00
In cancellation of accrued interest on same . . .	17.52
Total as above	$1,054.00

MATTHIAS ELLIS.
E. ROLLINS MORSE, *Trustee.*

Dated at Boston, this first day of March, A.D. 1879."

Page 16.

b. It did, therefore, clearly appear that Morse had acted as trustee under the assignment. He surrendered one of the policies assigned to him, and agreed that the surrender value should be applied to pay premiums on the other policies assigned to him.

c. That his memory, after the long lapse of time, should not be very clear, is not surprising. He did not testify in the case till on or about Oct. 3, 1885; that was the day on which the verdict was given.

Page 5.

d. Mr. Morse was called by the plaintiff as a witness. He testified that he had been in business in Boston as a banker for twenty years; that Matthias Ellis frequently "visited the witness' office when "in the East, and very frequently left papers with him for care and "safe-keeping, which were put in an envelope marked with Ellis' "name in the witness' private trunk; that it was never understood that "the witness was to examine them necessarily, but he looked upon it "that he had a right to do it if he wanted to, but that he very seldom "did; that he did not know that he ever did it. The witness remem-"bered seeing one assignment of insurance policies to himself. It "was a policy of the Mutual Benefit Life Insurance Company, he "thought, which he subsequently collected, and which was the only "one he ever remembered of having had or seen; that he did not "recollect the number of it. The amount collected on that policy by "witness was about $16,000. It was changed from time to time,

"— marked down, — to keep it alive; that he did not think he ever "had in his possession or saw a paper purporting to be the assignment "of three policies of insurance in the Connecticut Mutual Life Insur- "ance Company on the life of Matthias Ellis; that he did not remem- "ber of ever having seen or had it; that the first time he knew or had "reason to believe that a paper purporting to be the assignment of the "policies was in existence, was when he was called upon by Mr. "McFarlane (the treasurer of the defendant corporation), who said "that the company declined to pay him the money on the policy "assigned to him unless he (witness) stated that he had no claim "under that policy; that this was after Ellis' death a short time; that "at the request of the defendant's treasurer he signed the letter "Exhibit D; that he did not remember having any knowledge that "there was an assignment of these policies to him before the day "on which he signed that letter, and did not think he could have; that "he could not remember the amount of the policy that Mr. McFarlane "called his attention to; that he should have said there were three "policies, but that he could not remember positively about that, it was "so long ago; did not put it specially in his mind to keep it, as he "did not expect to have to think of it again; that he thought there "were three policies of $5,000 each, but might be mistaken; that he "had never, to his knowledge, been shown any paper purporting to be "an assignment of these policies from Matthias Ellis to himself; that "he did not remember being shown anything of the kind; that it "was so long ago he may have forgotten it; that he thought he did "have more than one policy on Ellis' life at one time; they varied "greatly, because at one time Ellis was unable to pay the premiums, "and we were obliged to change them about, so that he thought he did "have more than one policy in the beginning; that he thought the "policy he collected under was originally two policies, and it had been "changed perhaps two or three times, certainly twice; that he a number "of times signed papers in connection with the surrender of a policy; "that when he originally took the policies, he used to pay in cash, and "then certainly once, and, the witness thought, twice, when he took "them, he was going to reduce the first value in order to pay the pre- "miums on them; that he did not examine the papers so signed with "any care at all; that the money collected by him after Ellis' death

"was from Mr. Niver, the Mutual Benefit Insurance Company, of "New Jersey; that those two policies he received from Ellis, and "held them in connection with a trust that started many years prior to "Ellis' death; witness thought it was started by a friend of Ellis for "the benefit of his children, and the two policies on which the money "was collected by the witness were policies that Ellis had handed "witness with the request that witness would add them to that trust; "that they were so added by the witness, and the money was collected "on the policy from the Mutual Benefit Insurance Company of New "Jersey; that he never entered into any agreement with Mr. Ellis for "any other trust than what the witness had mentioned, and never "accepted any other; witness examined Exhibit C, and stated that "he had no recollection of it at all; that if he signed the paper he did "so at Mr. Ellis' request; if he signed it 'E. Rollins Morse, trustee,' "he supposed that he was under the impression that the paper was in "connection with the trust already spoken of, but that he signed a "great many papers at that time without knowing; that he failed in "any way to connect Exhibit D with the trust held by him (the "Hovey trust); that he had been unable to find any memorandum of "any policies in the Connecticut Mutual Life Insurance Company; "that at the time the matter was first presented he looked over all his "memoranda or documents to see if he could find anything which "would entitle him to retain those policies at that time, and found no "memoranda of anything of any kind in any shape or manner; that "after Ellis' death he wrote the letter (Exhibit D) to say that he "made no claim against the company."

Pages 6, 7.

This was all of said E. Rollins Morse's testimony on direct examination.

On cross-examination he stated "that he had no distinct recollec- "tion as to the number of papers Ellis handed him from time to time in "his lifetime; that he didn't think he ever handed him any assignment "of policies; that he thought Ellis did not hand him, but merely "showed him, the assignment of the policies in the New Jersey Com- "pany, and said he was going to take it to the office; *that he had no* "*recollection as to how many policies of insurance he ever had in his*

"*possession from Matthias Ellis; that he could not tell certainly;*
"*that he was very certain that he had more than one policy of*
"*insurance in his possession from Ellis; whether more than two or*
"*three he could not say at all; he didn't remember;* that he remem-
"bered what office the one he collected was in, but not the others;
"that he didn't know that he had any others; that he didn't recollect
"whether he did or not; that he didn't recollect anything about it; that
"he kept a memorandum of the papers that Ellis brought him for the
"trust before spoken of, but not of all that he brought to him for safe-
"keeping until he came again; that he kept all the papers in the same
"box, that he before referred to; that he had no doubt at all that he
"signed the paper Exhibit D if the Connecticut Mutual Life Insurance
"Company say they hold such a paper; that before it was called to his
"attention he had no recollection of signing such a paper; that he knew
"that he had signed several papers in connection with several com-
"panies; that he had an idea he signed that paper without reading it;
"that that was not his habit with his own business, but that he some-
"times signed papers without reading them when not connected with
"his own business; that he knew that it would not affect his own busi-
"ness; from the printed part of the paper that he could see what it
"was; that he had no doubt that the signature was genuine; *that he*
"*had not the slightest remembrance of how many papers Ellis*
"*brought him from time to time, and which witness put in that box;*
"*that he took no memorandum of it; they were put in a private box*
"*of his own in his own safe; that the box had a lock to it; that*
"*Ellis had no key to it; that the witness had the key; that he did*
"*not mean to swear that the assignment of the three policies of the*
"*Connecticut Company was never in the box; all he meant to say was*
"*that he didn't remember it; that it was very difficult to remember*
"*so many years back;* that he did not recollect defendant's counsel com-
"ing to his (witness') office until he spoke of it in the cross-examination,
"but remembered it then; that he did not recollect whether it was two or
"five years ago; that it was after Ellis' death; that at that interview he
"substantially told counsel that he had forgotten and did not remember
"anything about the matter; didn't think he went so far as to say his
"memory was a blank, but that he said he didn't recollect distinctly
"about it; *that he did not have, as he had already said, any recol-*

" lection of any assignment, but he thought he had seen one of another " company; that he did not mean to swear that the assignment was " not in his possession; that he had not sworn that yet; that he had " no recollection of signing the paper Exhibit C now that he has " seen it."

Pages 7, 8.

On re-direct examination, Mr. Morse testified that "*he had no recollection of sending to the Connecticut Mutual Life Insurance Company any assignment of the policies.*" On re-cross he stated that "*he could not say that he remembered that he did not send the assignment to the Connecticut Mutual Company; that he presumed he had no recollection on the subject, either one way or the other, whether he did or did not; he certainly did not remember of sending any; that he did not swear that he did not have the assignment, and he did not swear that he did not send it to the company.*"

Pages 8, 9.

e. "It was admitted by the plaintiff that said Ellis and E. Rollins Morse, trustee, signed Exhibit C, and that the original was in the possession of the Connecticut Mutual Life Insurance Company in Hartford, a copy being used at the trial without objection."

Pages 9, 16.

f. That Morse acted under the assignment, and surrendered policy No. 68,430, and had the surrender value apply on the two other policies, Nos. 68,428 and 68,429, which he held under the assignment, seems to be proved beyond a doubt.

g. The assignment to Morse was in the possession of the insurance company. Some person must have delivered it to the company. *Morse did not swear that he did not have the assignment, and he did not swear that he did not send it to the company. That he had various policies from time to time in his possession on Ellis' life, he admits. He is not able to particularize them.* There is no reason shown why he should not have accepted the trust, and after the long lapse of time between the date of the assignment — viz., May 19, 1877

— and the time when he gave his testimony — viz., October, 1885 — it is not surprising that his recollection was not very clear.

h. But that he acted under the assignment there can be no doubt, as he surrendered one of the policies assigned, and had its surrender value apply on the premiums on the other two policies assigned to him by the same assignment. This surrender was March 1, 1879, about six years and a half before he gave his testimony. He had forgotten that he ever did this; but his signature to the receipt was admitted.

i. The presumption is that he accepted the assignment.

j. Any act by Morse under it would amount to an acceptance of the trust.

k. Surrendering one of the policies assigned, and having its surrender value applied on the premiums on the other policies assigned to him, was an act, and an important act, done by him as trustee.

l. After that act, it was too late for counsel to argue that he did not accept the trust.

m. Morse, the trustee, having acted, could not afterwards affect the rights of the *cestuis que trust*, the two daughters, by not acting further. If he desired to cease to act, he could resign, and then another trustee would have been appointed in his place. For a court of equity to appoint a trustee is a familiar branch of equity jurisprudence, and in Massachusetts a statute has been in force for many years authorizing the court to appoint a new trustee, under a written instrument, where the prior trustee has declined, died, resigned, or been removed before the objects of the trust have been accomplished.

Rev. Stat. of Mass. (1836), ch. 69, sec. 8.
Gen. Stat. of Mass. (1860), ch. 100, sec. 9.
Public Stat. of Mass. (1882), ch. 141, sec. 5.

n. Even had Mr. Morse declined to accept the trust, the trust would not fail for that reason.

o. A trust never fails because the trustee declines to accept. The proper court will intervene and appoint a trustee to administer and execute the trusts.

Adams *v.* Adams, 21 Wallace, 185.

p. Even had the assignment never been delivered to Morse, the

trust would have been supported and upheld. Its delivery was not essential to its validity.

Adams *v.* Adams, 21 Wallace, 185.

q. Even had Morse never been notified of the trust, or had declined the trust, the assignment would still be upheld and a new trustee appointed.

Adams *v.* Adams, 21 Wallace, 185.
Perry on trusts, secs. 38, 45.
2 Story Eq. Jurisprudence, sec. 976.

In Adams *v.* Adams (21 Wallace, 185), the husband and wife executed and acknowledged a deed of real estate for the benefit of the wife. The husband got the deed recorded and always kept it in his own possession, except while it was at the record office. It never, in fact, was delivered. The trustee did not know of its existence, and when first informed of its existence he declined the trust. He never acted in any way under the deed. The court below upheld the trust, and appointed a new trustee to execute it, and this Court affirmed the decree.

A woman executed, in 1852, a deed purporting to assign her interest in certain South-sea annuities to trustees in trust for her nieces for life, and after their death for certain charities. The deed was prepared by her solicitor, but she retained it in her own possession for some time, and never informed any person of its execution. Shortly before her death she destroyed it, and made a codicil to her will purporting to dispose of the same interest to the children of her brother. The trustees in the deed deposited the fund in court, and the children of the brother petitioned to have the fund paid to them. Held, that the trust deed must stand, although no notice was given of it to any person but the solicitor.

Way's settlement, 10 Jurist (N.S.), page 1166.

r. No delivery of the assignment was necessary, and a failure by Morse to accept the trust would not have invalidated it.

Adams *v.* Adams, 21 Wallace, 185.
Way's settlement, 10 Jurist (N.S.), 1166.

s. The assignment to Morse, trustee, was valid, and the Court should have so ruled.

t. Even had a delivery of the assignment and an acceptance of the trusts been necessary (which is denied), and there was any evidence on the subject, the question of delivery and acceptance should have been left to the jury.

u. It is only in cases where the facts are clear and not in dispute, and there is substantially nothing in dispute to go to the jury, that the court will interpose and direct a verdict.

Richardson *v.* City of Boston, 19 Howard, 263.
Hickman *v.* Jones, 9 Wallace, 197, 201.
Bevans *v.* U. S., 13 Wallace, 57.
Klein *v.* Russell, 19 Wallace, 433.
Moulor *v.* Ins. Co., 101 U. S., 708.
Manchester *v.* Ericsson, 105 U. S., 347.
Phœnix Ins. Co. *v.* Doster, 106 U. S., 30.
Conn. Mut. L. Ins. Co. *v.* Lathrop, 111 U. S., 612.
Orleans *v.* Platt, 99 U. S., 676.
Randall *v.* Balt. & Ohio R.R. Co., 109 U. S., 478.
National Bank *v.* Insurance Co., 103 U. S., 783.
Schofield *v.* Chicago & St. Paul R.R., 114 U. S., 615.

v. The ruling of the court against the validity of the assignment to Morse, trustee, was a more favorable ruling than the plaintiff was entitled to.

V. Morse, by disclaiming after Ellis' death, any interest in the policies, could not affect the rights of the *cestuis que trust*, the two daughters. Their rights still remained.

a. There was no evidence that they were ever consulted upon the subject of disclaiming.

b. If the defendant was not entitled to the money, the daughters of Ellis were, and the plaintiff was not entitled to any part of it.

c. Morse's disclaimer could not, under any circumstances, have vested in the assignee in bankruptcy any interest.

VI. The next ground taken by the plaintiff was, that the assignment to Morse was fraudulent and void as against creditors.

This is denied.

a. There was no evidence in the case that either Morse, or the *cestuis que trust*, the daughters of Ellis, had any knowledge of his, Ellis', financial condition, or that he was insolvent, or that there was any fraudulent purpose or fraudulent intent on his part in making the assignment to Morse.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

b. This was essential to constitute fraud in the assignment.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

c. A man, though insolvent, may pay a reasonable amount to keep alive policies on his life taken out in his wife's name.

Central Bank of Washington *v.* Hume, 128 U. S., 195.

In McCutcheon's Appeal, 99 Penn. State Rep., 133, the Court say (speaking of a statute of Pennsylvania), that where the policy is taken out for the benefit of the wife, the question of good faith is not open, but where one is assigned, it is open; but that the mere fact that the assured was insolvent at the time of the assignment does not warrant the inference that the assignment was in fraud of creditors, and that it may, notwithstanding, have been made in good faith and without fraud.

Vide also Anderson's Estate, Hay's & Kerr's Appeal, 85 Penn. State Rep., 202.

In the earlier case of Appeal of Elliott's Ex'rs, 50 Penn. State Rep., 75, the policies were assigned by the assured when deeply insolvent, in trust for the benefit of his wife. The policies remained together in the safe of the assured, where they were found after his death. The court say the assignments did not appear to have been known to the trustee or the *cestuis que trust*. The question arose after the death of the assured, whether the executors should be charged with the proceeds of the policies as part of the estate of the assured. The court held that the assignments were fraudulent and void against

creditors, and that the executor should treat the proceeds as assets of the assured.

d. The policies in question in the present case when they were assigned had no value except their surrender value. If there was any fraud, it could only be to the extent that the creditors were defrauded, and that could not exceed the extent of the value to them; that is, could not exceed the surrender value.

e. If a man can legally when insolvent pay premiums to keep alive, for the benefit of his wife, policies on his own life, taken out in the name of his wife, can he not legally assign, for the benefit of his children, policies taken out by him? Will not the assignment of a policy on his life, which has no more value at the time than the surrender value, be protected as much as the payment of premiums to a like amount; for instance, on a policy taken out on his life by his wife? Is not one as reasonable, natural, humane, and commendable a provision as the other? Does the fact that it is an assignment of a policy make it more obnoxious than if he had paid money to keep other policies alive for the benefit of his wife or children? One is the assignment for the benefit of his wife and children of an unexecuted contract; the other is a payment of money in premiums to keep alive a like contract for their benefit. If the creditors are wronged, they are wronged as much in one case as in the other.

If when in insolvent circumstances he obtains a policy in a reasonable amount on his life, payable to his wife or children, and the amount of the premium is reasonable, and the transaction is one to be upheld and protected in law, should not a transfer of an existing policy for the benefit of his wife or children be in like manner upheld and protected? Where is the substantial difference? Creditors may be injured in the one case as much as in the other. If there is any loss to the creditors, it is the money paid in one case for premiums, and in the other (and it may be a smaller sum), the surrender value of the policy, and that is *based on premiums also.*

Whether solvent or insolvent, he is bound by all the laws of humanity to feed and clothe his wife and children in his lifetime; and money used by him for this purpose would never be attacked as fraudulently used. Is it unreasonable, whether solvent or insolvent, that he should in his lifetime make a reasonable provision for them after his

death, either by obtaining a policy on his life, payable to them, and paying the premiums on it, or doing substantially the same thing, — assigning an existing policy for their benefit?

A statute of Massachusetts, after providing that "a policy of insurance on the life of a person, expressed to be for the benefit of a married woman, or assigned, transferred, or made payable to a married woman, or to any person in trust for her, or her benefit, whether procured by herself, her husband, or any other person, and whether such transfer be made by her husband or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband, or his creditors, or the person effecting or transferring the same, or his creditors," also provides that "when a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of such other, or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto, against the creditors and representatives of the person effecting the same. If the premium is paid by a person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors, subject, however, to the statute of limitations."

Pub. Stat. of Mass. (1882), chap. 119, sect. 167.

This has been the law in Massachusetts ever since 1864.

Gen. Stat. of Mass. (1860), chap. 58, sect. 62.
Acts of 1864, chap. 197.

Although the assignment to Morse, trustee, may possibly not bring this case within the strict *letter* of this Massachusetts statute, yet it certainly does bring it within its *spirit* and *substance*. After the assignment, it may be truthfully said, that the policy, *by virtue of the assignment*, is to be for the benefit of another, or expressed to be for the benefit of another. If, years after the policy had been issued, the assured had directed the insurance company to insert in it a statement that it was for the benefit of another, specifying whom, and the company had inserted the same in the policy, the case would have been within the provisions of this statute. It is not necessary that such statement be part and parcel of the policy when first issued. It is

certainly difficult to see, so far as creditors or their rights are concerned, any difference in *substance* between a policy obtained by a debtor upon his own life, and expressed on its face to be for the benefit of another, and a policy obtained by such debtor upon his own life, and afterwards assigned to another, or in trust for another. The two transactions come *substantially* to the same thing.

f. If the assignment to Morse was valid, (if there was any doubt on that point upon the evidence, it should have been submitted to the jury), then it is immaterial what rights the defendant had under the assignment made to it. The plaintiff, if he recovers at all, must recover on the strength of his own title or claim.

VII. An assignee in bankruptcy, who affirms in part a fraudulent transfer by the bankrupt, affirms it *in toto*.

Butler *v.* Hildreth, 5 Metcalf (Mass.), 49, 51.

He has full power to affirm it, and when once affirmed, by him, it cannot afterwards be disaffirmed.

Butler *v.* Hildreth, 5 Metcalf, 49.
Snow *v.* Lang, 2 Allen (Mass.), 18.
Hazelton *v.* Allen, 3 Allen (Mass.), 114.

a. Here the present assignee in bankruptcy affirmed the surrender by Morse, trustee, of the policy No. 68,430.

b. It was that surrender that kept alive the two other policies assigned to the trustee, *and the present assignee in bankruptcy claims all benefits arising from that surrender, by claiming the whole proceeds of the policy in this case.*

c. If the act of the trustee in that surrender was a nullity, the policies would have been avoided. If that act was a nullity, the assignee cannot claim that the policies continued in force. If that act was valid, it must be on the ground that the assignment was either valid, or that the assignee has affirmed it. It cannot be valid for one purpose and void for another. The assignee treats it as valid by claiming that the policy in question here, continued in force, and claiming the full amount paid under it.

The ruling of the court against the validity of the assignment was more favorable to plaintiff than it should have been.

VIII. The next question which arises is, if the assignment for the benefit of his children, of an existing policy is not to be upheld or protected, to what extent is it void against creditors? How much have they been damaged? Only to the extent of the value at the time assigned, of the thing assigned. What was its value then? Nothing more than its surrender value. It is a peculiar kind of property. It may lapse for non-payment of premiums; the assured may end it at any time by violating its provisions. Creditors have no power to prevent any such violation. The prolongation of the bankrupt's life is something in which he is interested more than all others. His children also have a direct interest in it; they have an insurable interest in his life sufficient to support a policy taken out in their own names, or in his name payable to them, or to support an assignment for their benefit of a policy already taken out by him.

"What a trustee in bankruptcy does if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of, is the surrender value of the policy."

Per Mellish, L. J., in Holt *v.* Everall, 34 Law Times Reports (N.S.), page 602.

In re McKinney (S. Dist. N. Y.), 15 Fed. Rep., 535.

IX. An assignee in bankruptcy is not bound to assume and take upon himself the burden of all the property and contracts the bankrupt may have. Some may be exceedingly burdensome, and a greater detriment than benefit to the bankrupt's estate, (a *damnosa hæreditas.*)

Robson on Bankruptcy, page 478, 5th ed.

Deacon on Bankruptcy, page 535.

Streeter *v.* Sumner, 31 New Hampshire, 542.

Smith *v.* Gordon, 6 Law Reporter, 313.

Copeland *v.* Stephens, 1 Barn. & Alderson, 593, 604, 607.

Hanson *v.* Stevenson, 1 Barn. & Alderson, 307.

Turner *v.* Richardson, 7 East, 335.

Ex parte Faxon *in re* Laurie, Blood, & Hammond, 1 Lowell Decisions, 404.

Kimberling *v.* Hartly, 1 Fed. Reporter, 574.

a. Leases are often of this character.

b. A life-insurance policy, except to the extent of its surrender value, may be of this character; some have no surrender value.

c. An assignee in bankruptcy has no insurable interest in the life of the bankrupt.

In re McKinney (Southern Dist. N. Y.), 15 Fed. Rep., 535.

d. He has no right to pay the premiums out of the estate to keep it alive, from time to time; his business is to wind up and distribute.

In re McKinney (Southern Dist. N. Y.), 15 Fed. Rep., 535.

e. Bates, the first assignee, had this view, and he never meant to assert any ownership over any policy on Ellis' life.

X. There are certain contracts which do not pass to an assignee in bankruptcy.

a. A contract for personal services of the bankrupt would not pass to an assignee in bankruptcy, except to the extent of wages earned prior to the adjudication.

Streeter *v.* Sumner, 31 New Hamp., 542.

Under the old bankrupt law in England, all present, as well as future property of the bankrupt acquired prior to his obtaining a certificate of discharge passed to his assignee.

13 Elizabeth, ch. 7, sec. 11; 4 Stat. at Large, page 302.

6 George IV., ch. 16, secs. 63 and 64; 43 Stat. at Large, page 66.

1 & 2 William IV., ch. 56, sec. 25; 50 Stat. at Large, page 370.

Robson on Bankruptcy, pages 442, 443, 5th ed.

Willes, J., in Kitson *v.* Hardwick, 7 Law Rep. (Com. Pleas), 479.

Troughton *v.* Gitley, 2 Ambler Rep., 630.
Everett *v.* Backhouse, 10 Vesey, 94.

By the English Act of 1869, after the bankruptcy has been closed, the property acquired by a bankrupt does not pass to the assignee, although he does not get his discharge.

In re Pettit's Estate, 1 Law Rep. (Ch'y Division), 478.
32 & 33 Victoria, ch. 71, sec. 15; 90 Stat. at Large, page 281.

But even under the old English bankrupt law, wages for personal labor, earned after the adjudication, did not pass to the assignee.

Chippendall *v.* Tomlinson, 4 Douglas, 318.
Silk *v.* Osborn, 1 Espinasse, 140.
Williams *v.* Chambers, 10 Queen's Bench, 337.
Ex parte Walters, 2 Montagu, Deacon, & De Gex, 635.
Ex parte Grimstead, De Gex, 78.
Ex parte Vine *in re* Wilson, 8 Law Rep. (Ch'y Division), 366.

In a leading case where there had been a breach of a contract for the personal services of the bankrupt *before* the adjudication, and the contract provided a certain sum as damages, it was held that the cause of action did pass to the assignee.

Drake *v.* Beckham, 11 Meeson & Welsby, 315.
Same case, 2 House of Lords Cases, 579.

Parke, B., on page 625, in the case in the Lords, says: "This contract, if unexecuted, would clearly not have passed to the assignee."

Lord Campbell in same, page 643.

Right of action cannot be made to pass to an assignee in bankruptcy in respect to contracts uncompleted at the time of bankruptcy, by their adoption and completion, where the personal service of the bankrupt himself is of the essence of the contract.

Erle, Wilde, & Cresswell in Beckham *v.* Drake, 2 House of Lords Cases, pages 604, 633, 615, 616.

Baron Rolfe, page 620 in same, says: "They do not take, so to say, the person of the bankrupt, and so neither can they maintain actions whereby his person is to be compensated for injuries it may have sustained."

b. No claim for damages for injury done to the bankrupt's body or mental suffering caused to him, did pass, although the claim arose before the adjudication. The claim to pass must have been one relating to property.

Howard *v.* Crowther, 8 Meeson & Welsby, 601.
Drake *v.* Beckham, { 11 Meeson & Welsby, 315. / 2 House of Lords Cases, 579.
Rogers *v.* Spence, 13 Meeson & Welsby, 571.
Same in Lords, 12 Clark & Finnelly, 700.
Brewer *v.* Dew, 11 Meeson & Welsby, 625.
Wetherell *v.* Julius, 10 Common Bench, 267.
Stone *v.* Boston & Maine Railroad, 7 Gray, 539.
Ex parte Vine, 8 Law Rep. (Ch'y Division), 364.

Would a policy against accident or sickness pass to an assignee except to the extent of its value at the time of the bankruptcy?

Suppose under an accident policy an accident occurred, or under a health policy sickness occurred, after the adjudication, would the assignee in bankruptcy be entitled to recover the damage or compensation?

The injury is to the person, in which the assignee has no interest.

And in case of a life policy, the contingency which makes the amount payable is the termination of that in which the assignee has no interest, viz., the life of the bankrupt.

Neither his life nor his body pass to the assignee in case of bankruptcy.

His right to his own life, and to insure it, is as much and as purely personal as his right to be protected and insured against accidents or sickness, or to earn a livelihood by his own personal labor.

XI. The suit was barred by the Statute of Limitations.

By Sec. 5057 of the Revised Statutes of the United States, title "Bankruptcy," it is provided that "no suit, either at law or in

equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The statute applies, not only to suits to recover property belonging to the bankrupt or conveyed in fraud, but also to actions to recover money or debts owing to the bankrupt.

Jenkins *v.* International Bank, 106 U. S., 571.
Bailey *v.* Glover, 21 Wallace, 346.
Gifford *v.* Helms, 98 U. S., 252.
Wisner *v.* Brown, 122 U. S., 214.

The assignment of the policies to Morse, trustee, was May 19, 1877; Bates was appointed assignee in bankruptcy, Aug. 6, 1878; the assignment to the defendant was May 21, 1879; and the payment made to defendant was made Dec. 31, 1879; and this suit was brought Sept. 30, 1882.

a. That Bates, the assignee, knew that Ellis had had policies of insurance on his life; that he made no effort to find out anything about them; that he could readily have found out by very little exertion; that with what information he had he was put upon inquiry seem quite clear from the evidence. He continued assignee till June 6, 1882. This Court, in Bailey *v.* Glover, 21 Wallace, 342, say on page 348, that in equity the decided weight of authority is that "where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part*, the statute does not begin to run until the fraud is discovered;" and on page 349, "that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity;" and on same page, "We hold that *when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud* which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute

does not begin to run until the fraud is discovered by or becomes known to the party suing, or those in privity with him."

See Rosenthal *v.* Walker, 111 U. S., 185, where the allegation was fraudulent concealment.

Vide also Traer *v.* Clews, 115 U. S., 528.

b. "The postponement is not until the discovery of fraud, but until the period when, with due diligence, he might have discovered it."

Andrews *v.* Dole, 11 Nat. Bank Reg. (New Jersey), 366.

c. Mere failure to discover the cause of action where there is no element of concealment does not take the case out of the statute.

Norton *v.* Villebeuve, 13 Nat. Bk. Reg. (Woods, J.), 304.

d. "If he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others."

Nudd *v.* Hamblin, 8 Allen, 133.
See also Cole *v.* McGlathry, 9 Greenleaf, 131.
McKown *v.* Whitmore, 31 Maine, 448.
Rouse *v.* Southard, 39 Maine, 404.
Yancy *v.* Cothran, 32 Fed. Reporter, 687.

e. He was put on inquiry, and various circumstances existed which might have led him to take proceedings to find out earlier.

Dean *v.* Thwaite, 21 Beavan, 623.

f. In Bishop *v.* Little, 3 Greenleaf, 408, the court says: "No case can be found where the statute has been avoided at law or in equity, unless on the ground of fraudulent concealment on the defendant's part."

In Gibbs *v.* Guild, 9 Law Rep. (Queen's Bench Division), 59, a replication to a plea of the Statute of Limitations, that defendant concealed the fraud during six years was held good, and that the statute did not begin to run till the discovery. This action was to recover damages for fraudulent representations made by defendant to plaintiff to induce plain-

tiff to purchase shares in a company, and was after the passage of the Judicature Act of 1873, by which common law and equity, in a certain sense, were both abolished, and the High Court of Justice was not only empowered, but ordered, to administer justice according to the principles of law and equity together, and to give relief according to such principles concurrently. The court say that if they proceed on the principles of strict common-law actions and strict common-law pleadings, there were two decisions in point in favor of the defendant, and that such replication would not be held good, viz.: Hunter *v.* Gibbons, 1 Hurlstone & Norman, 459, and Imperial Gas Light Co. *v.* London Gas Light Co., 10 Exchequer, 39; and if a pure equity proceeding, the replication would be held good, as decided in Booth *v.* Lord Warrington, 4 Brown Parliament Cases, 163. The court then proceeded to decide the case on the ground that it was not bound by the rules of the common law, but would have to see what a court of equity would have done in such a case.

Bates, the first assignee in bankruptcy, was aware of the existence at one time of policies of insurance on Ellis' life. He (Bates) might, by slight efforts, have found out all the circumstances in regard to these policies. He was not bound to assert any interest in them. An assignee is not bound to assert a title to all property of a debtor. Some of it may be a *damnosa hæreditas*, an oppressive lease, for instance, or other burdensome contracts, or some policies of life insurance. He can refuse to assert a title over that which will be of no benefit or a damage to the estate.

Bates, whose deposition was taken and used by plaintiff, testified that he had known of Ellis having had policies of insurance, but had reason to think he had parted with them; that at one time previous to Ellis' bankruptcy, he (witness) had learned of an assignment of some insurance to E. Rollins Morse, of Boston, and, after bankruptcy proceedings, witness could not learn that any interest in such policies remained vested in said Ellis in any way; and that at the time of the bankruptcy proceedings, he did not know that said Ellis had any interest in any policies of life insurance, and having no reason to believe that said Ellis had any interest remaining in life-insurance policies, he did nothing about them.

He heard Ellis frequently speak of his life insurance up to 1873 or 1874, and knew of his paying premiums on his life insurance before his assignment in bankruptcy; that Ellis told him, and he knew from seeing the policies of his life insurance up to 1866, after that he heard him speak of it, the amount he had, and amount of premiums, and conversations upon the subject were continued up to about 1876; that he did not remember the year of Ellis' death, — saw a notice of it a short time after his death in a Massachusetts paper; that he supposed Ellis had made such disposition of his life insurance that his children would be left with nothing; that he had no reason to suppose that any assignment was for the benefit of Ellis' daughters, or would be so held; that he supposed it would be the property of such parties as had advanced him money, and had taken as their only security an assignment of some part of his life insurance, having no interest belonging to Ellis or to his estate; *that it was, perhaps, a year after Ellis' death that he first learned that Ellis' daughters had received, or would receive, some money through E. Rollins Morse from the proceeds of policies held by him; that witness had never understood that the policies were assigned to Morse for their benefit, but for money considerations.*

Pages 10, 11.

Why did he not institute inquiries? Why did he not examine Ellis in his lifetime?

This is the testimony of Bates, the first assignee in bankruptcy. Ellis' petition in bankruptcy was filed in Kentucky July 3, 1878, and Bates was elected assignee Aug. 6, 1878, and continued to act as such until June 6, 1882, when he resigned and plaintiff was appointed.

Page 5.

Ellis died Nov. 21, 1879.

Page 9.

This suit was brought Sept. 30, 1882.

Page 3.

Joseph Pratt, a creditor and brother-in-law of Ellis, testified that

he informed Bates in May, 1882, of the existence of the policy in question.

Page 11.

Bates had quite enough of information to put him on a course of inquiry which would have resulted in his knowing all the facts about these policies. He never intended to assert any title, and hence he made no further inquiries.

Edward Avery, the administrator of said Matthias Ellis' estate, was called by the defendant and testified as follows: "That he didn't think he had any conversation with Bates while he was assignee; that he did have a conversation with him after he had resigned as assignee a year ago the past summer, in August; that he had the conversation with him either at Niagara Falls or in that vicinity; it occurred while they were there. Afterwards Bates made statements to him at his home in Riverton, Ky. Bates said he had given a deposition in the case that he knew from Ellis; — thinks the way he stated it was this: '*Mat told me about his policies of insurance, and that he had made an assignment of them, or some of them, to E. Rollins Morse.* I knew that he was not able to pay his premiums, and hadn't been for some months before he went into bankruptcy, *and I took no steps or did nothing in regard to it whatever.*' *It was referred to twice, and he said that he supposed that he, as assignee, had nothing to do with matters of life insurance, and that he had been substantially advised to that effect by the register in bankruptcy, before whom the proceedings were pending, and therefore he had taken no steps in regard to it; that this was the substance of the conversation; as to part of it, he had given the exact words.*"

Pages 11, 12.

Bates knew of the policies, or, to say the least, was put on inquiry, and must be assumed to know what he would have ascertained had he made inquiry.

If there was any evidence tending to show that Bates knew of the policies or had sufficient information to put him upon inquiry, the question of his knowledge or the extent of his information should have been submitted to the jury.

g. But even if the rule be the same at law as in equity, there was no concealment by the defendant in this case, and none was pretended.

h. Concealment implies knowledge on the part of the defendant that the plaintiff had some right to the policy or to the money, and some act done by the defendant with a view to keep the plaintiff from knowledge of the existence of the policy or collection of the money.

i. It did not appear that Bates had made the slightest effort to obtain any knowledge or information in regard to the policies.

j. Upon the state of the evidence in the case, the court should have ruled that the suit was barred by the statute of limitations.

k. But even if there was not evidence sufficient to justify the court in making such ruling, there clearly was evidence enough to require the case to be submitted to the jury on the question of Bates' knowledge and information, and what knowledge or information he would have obtained upon inquiry.

l. And the ruling of the court against the defendant upon the statute of limitations, was a ruling more favorable to the plaintiff than he was entitled to.

XII. The court ruled that the plaintiff was entitled to recover the surrender value of the policy.

That ruling was more favorable to the plaintiff than he was entitled to.

a. He had no insurable interest in the life of the bankrupt.

In re McKinney, 15 Fed. Rep., 535.

Creditors had an insurable interest, but not the assignee in bankruptcy. Their insurable interest was only to the extent of their debt.

b. He had no right to pay out of the estate any moneys to keep the policy alive.

In re McKinney, 15 Fed. Rep., 535.

c. An assignment to a person who has no insurable interest in the life of the assured passes nothing.

Warnock *v.* Davis, 104 U.S., 775.
Cammack *v.* Lewis, 15 Wallace, 643.
Basye *v.* Adams, 81 Kentucky, 374, 375.

Missouri Valley L. Ins. Co. *v.* Sturges, 18 Kansas, 93.
Franklin L. Ins. Co. *v.* Hazzard, 41 Indiana, 116.
Same *v.* Sefton, 53 Indiana, 380.

In the case of Warnock *v.* Davis, this Court say, on page 779, "The assignment of a policy to a party not having an insurable interest is as objectionable as taking out a policy in his name."

And it is placed on the ground that it is a wagering transaction, a mere speculation, giving a direct interest in the early termination of the life of the assured, and against public policy.

d. If a policy of life insurance can ever pass to an assignee in bankruptcy, it must be only to the extent of enabling him to collect its surrender value.

It has no market value.

The assignee cannot sell or assign it.

An assignment of it to a person having no insurable interest in the life of the assured passes nothing.

The assignee cannot pay premiums out of the estate to keep it alive.

What then is the extent of his interest in such policy, merely to surrender it and receive its surrender value.

e. If the creditors have been defrauded by a fraudulent assignment of it by the debtor, to what extent have they been injured? Only to the extent of the value of the contract, and that is its surrender value, nothing more.

Suppose Ellis had not gone into bankruptcy, and a creditor had, on the ground that it had been fraudulently assigned, sought to reach the policy and have it applied to the payment of the debt, what would or could a court have done, had it given the relief asked? It could not have ordered the policy to be sold, as its sale or assignment to a person having no insurable interest would have passed nothing. All that a court could have done under these circumstances would have been to pass an order that it be surrendered to the insurance company for its surrender value and such value applied towards the payment of the debt.

In Anthracite Ins. Co. *v.* Sears, 109 Mass., 383, a creditor by bill in equity against the debtor, and an insurance company insuring his life, sought to reach the policy on his life. The court in giving

its opinion say, "If it is necessary to ascertain the value of the policy, that can easily be done by a master or otherwise."

f. The only interest that an assignee in bankruptcy has in the money paid on a policy on the life of the bankrupt issued to the bankrupt, where the bankrupt dies after the institution of proceedings in bankruptcy, is the surrender value of the policy.

In re McKinney, 15 Fed. Rep., 535.

Vide also the remarks of Mellish L. J., in Holt *v.* Everall, 34 Law Times Reports (N.S.), page 602.

In the McKinney case, the wife of the bankrupt, after his bankruptcy, supposing, but erroneously, that the policy was for her benefit, had paid the premiums, and kept it alive. Upon his death the insurance company were ready to pay the money, and the question was as to the extent of the interest of the assignee in bankruptcy, and the court held that the extent of the assignee's interest was the *surrender value.*

Where a wife, possessed of separate estate, procured a policy of insurance upon her own life, payable upon her death to her husband, and paid the premium out of her own estate for a year, before the end of which he was adjudged a bankrupt, and she after the adjudication paid out of her own estate the premiums for the two following years; and before the fourth premium became due she died. *Held that the husband was, as against his assignee in bankruptcy, entitled to the proceeds of the policy.*

In re Owen & Murrin (Dillon J.), 8 Nat. Bank Reg., 6.

A creditor proving a debt in bankruptcy, where the creditor holds as collateral security for the payment of the debt a policy of insurance on the life of the bankrupt taken out by the bankrupt and payable to the creditor, is required to deduct only the *surrender value of the policy.*

In re Newland (Southern Dist., N.Y.), 7 Nat. Bank Reg., 477.

A creditor held as security a policy obtained by the debtor. The debtor made an assignment for the benefit of his creditors which provided that dividends should be paid on debts after deducting the

security. No deduction was made in the case. The court say, "the policy at the date of the deed was of no appreciable value, so that no deduction from the amount of the debt could have been made, and there is no evidence of the abandonment of the security."

Parker *v.* Marquis of Anglesea, 25 Law Times Reports (N.S.), 482.

Schondler *v.* Wace, 1 Campbell, Rep., 487, decided in 1808, seems to be apparently in conflict with the view taken here of the extent of the interest of the assignee in bankruptcy, but is not in conflict, *as under the English bankrupt law at that time the assignee was not only entitled to what the bankrupt had at the time of the adjudication, but also to what he acquired afterwards and before he obtained his certificate of discharge.*

A debtor's assignment of a policy of insurance upon his life to trustees for the benefit of his creditors contained a covenant that he would pay the premiums, and if he did not, that he would pay what should be paid as such premiums; also that he would do no act by which the policy should be forfeited. He did not pay the premiums, and went to Canada, by which the policy was forfeited. In a suit for breach of contract it was held that the amount of premiums paid by the trustee could be recovered, and also the present value of the policy, but not the whole amount of the policy.

Hawkins *v.* Coulthurst, 117 Eng. Com. Law Rep. (5 Best and Smith, Q. B.), 343.

Pledgee of a life policy surrendered it without right, and took out a new policy for paid-up value, and that was surrendered and old policy attempted to be reinstated. Trover for conversion by the pledgor the assured. The jury found a special verdict that the amount of the debt was a given sum, $2,820.67; the market value of the policy a certain sum, viz., $4,908; and that the plaintiff had sustained special damages by the surrender to the amount of $150. The court held that the plaintiff was entitled to recover the difference between the amount found as his special damage increased by the market value of the policy as found by the jury, and the amount due on the debt.

Wheeler *v.* Pereles, 43 Wisconsin, 332.

Bill in equity against Life Insurance Company; also two actions at law against Life Insurance Company to recover the amount insured. In each case the assured had died. The civil war between the North and South prevented the payment of premiums. A majority of this Court held that the amount insured could not be recovered, as the policies were avoided by the non-payment of the premiums, and as the war did not excuse the non-payment, but that the equitable value of the policies at the date of the first default could be recovered.

New York Life Ins. Co. *v.* Statham,
Same *v.* Seyms,
Manhattan Life Ins. Co. *v.* Buck,
} 93 U. S., 24.

A life insurance company insured a citizen of Virginia, and after receiving the premiums for a number of years, in May, 1861 refused to take any further premiums. It was held on the death of the assured that an action would lie on behalf of the beneficiary for dissolving its contract by such refusal, and that the measure of damages in an action brought for breach, in not performing its contract, was the value of the policy at the time when the contract was dissolved.

Smith *v.* Charter Oak Life Ins. Co., 64 Missouri, 330.

Suppose the assignee in bankruptcy, before Ellis' death, had sued in trover for the conversion of the policy, — the measure of damages clearly would have been only the surrender value.

Suppose the assignee before Ellis' death had waived the alleged conversion and sued in *assumpsit* for the value of the contract, — the measure of damages clearly would have been only the surrender value.

Does the occurence of an event, long after the bankruptcy, to wit, the death of Ellis, in which the assignee had no interest, and which event alone gave an increased value to the policy, alter the measure of the assignee's rights?

Suppose the assignee in bankruptcy, after he had been appointed, had brought a bill in equity against Morse, trustee, and the defendant, for the surrender of the policy, and the defendants in that suit for any reason, either because Ellis' health had become so impaired that a new policy could not be obtained upon his life, or for any other reason had offered to pay the assignee in bankruptcy the surrender value of

the policy, would not the court, upon payment by the defendants of that sum, have protected the rights of the defendants in the policy and required the assignee in bankruptcy to release his rights?

If upon the election of Bates, assignee, all the parties had surrendered to him the policy, all he could have obtained for it was its surrender value. *Could he ask, or can his successor, the present plaintiff, ask, to be put in any better position than he would have been under those circumstances? Is the bankrupt's estate to be made more than whole? If the bankrupt's estate was wronged, is that wrong to be more than righted?*

Suppose the policy had been an accident policy, or one against sickness, and the accident or sickness had occurred after the adjudication, could the assignee in bankruptcy have recovered the damages or compensation payable under the policy? Would not a policy on the life of the bankrupt, except as to its surrender value, be as purely *personal* as one against *accident or sickness?* In the one case, the *damage to the body or the disability of the body to labor, would be the ground of payment by the insurance company; in the other, the destruction of the body by death.*

The plaintiff alleges in his declaration (page 3), "that said policy numbered 68,430, was by said Ellis, without the knowledge or consent of his assignee, surrendered to said insurance company, March 2, 1879, and a portion of the surrendered value was by said company credited to said Ellis, and applied in payment of the annual premium then due upon policy numbered 68,429." If the policy was illegally surrendered, then No. 68,429 lapsed for non-payment of premium, except to the extent of its surrender value, and that was its only value. If the plaintiff affirms the surrender by Morse, trustee, then does he not recognize his title as trustee, and his act in surrendering it as rightful? and can he affirm Morse's title in part and repudiate it in part?

XIII. The plaintiff was not entitled to maintain his suit upon his declaration even for the surrender value. He misapprehended his remedy — if he had any. He was not entitled to recover upon the special count or upon the count for money had and received.

His proper remedy, if he had any, was either in tort for the conversion of the policy or in contract for its surrender value.

Upon his declaration as framed, he was not entitled to recover the surrender value of the policy.

XIV. Although the defendant has no right to have the judgment reversed, if, as against the defendant it is erroneous, because the defendant is not an excepting party, and could not be, in view of the fact that the amount of the judgment was not sufficient to support a writ of error in behalf of the defendant, yet, as before stated, not for the purpose of asking a reversal, *but in order to maintain that the rulings were more favorable to the plaintiff than they should have been*, it is open to the defendant to show that the verdict and judgment upon the facts set forth in the record, and the law applicable to these facts, should have been for the defendant.

And the defendant in conclusion submits that the rulings were more favorable to the plaintiff than they should have been.

JOSHUA D. BALL,
For defendant in error.